87-1902

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED CHEMICAL NUCLEAR PRODUCTS, INC. and VALLEY PINES ASSOCIATES,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

This suit seeks Just Compensation for a regulatory taking of the Barnwell Nuclear Fuel Plant (the "Barnwell Plant"), a virtually completed facility in South Carolina whose sole viable economic use is to reprocess spent nuclear fuel. Vigorous government inducements deliberately created "reasonable investment-backed expectations" and led petitioners to spend over $200 million to build the single-purpose Barnwell Plant on federally-provided land under a federal construction permit. Yet in 1977, after more than 20 years of government encouragement but before the Plant was finally licensed to operate, President Carter abruptly reversed the government's course: At the President's direction, the Nuclear Regulatory Commission outlawed commercial reprocessing and obliterated the statutory licensing scheme—not for any reason of health or safety—but solely for foreign policy reasons, as a symbolic sacrifice of the Barnwell Plant, in order to demonstrate to other countries that the United States was committed to nonproliferation of nuclear weapons. *Westinghouse Electric Corp.* v. *United States*, 598 F.2d 759 (3d Cir. 1979), held that the 1977 ban was valid as a temporary "moratorium" of about two years, but that an "open-ended" ban of "unreasonable duration" would be invalid. The "moratorium", which has now continued for eleven years, destroyed all viable private economic use of the single-purpose Barnwell Plant. The questions presented are:

1. Whether the Court of Appeals incorrectly decided the question this Court left open last year in *First English* and *Keystone*, in holding that the "nuisance" exception applies in this case to bar Just Com-

pensation where government regulation destroys all viable economic use of private property.

2. Whether the virtually completed Barnwell Plant, before final licensing, is "property" that was the subject of a taking requiring Just Compensation.

3. Whether the Court of Appeals misconstrued takings law, as established in *Nollan*, when it simply assumed that the open-ended "moratorium" was forever valid, for purposes of determining whether the "moratorium" worked a permanent taking.

4. Whether the Court of Appeals improperly held that, assuming there is an on-going "temporary taking" of the Barnwell Plant, federal law imposes a novel "exhaustion" requirement that the owners of the Barnwell Plant must now reapply to the federal government, to give "an opportunity for it to show what its intentions are", before this suit may proceed further.

RULE 28.1 LIST

The caption contains the names of all the parties.*

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* Companies listed pursuant to Rule 28.1 because of their relationship to the respective petitioners are:

Allied-General Nuclear Services (a partnership):
Allied Chemical Nuclear Products, Inc.
Valley Pines Associates

Allied Chemical Nuclear Products, Inc.:
Allied-Signal Inc.

Valley Pines Associates (a partnership):
Chevron U.S.A. Inc.
Chevron Corporation
Shell Oil Company
Shell Petroleum Inc.
Shell Petroleum N.V.
Royal Dutch Petroleum Co.
The "Shell" Transport and Trading Co., P.L.C.

Other affiliates of Allied-Signal Inc. that have issued publicly-held debt securities are The Signal Companies, Inc., Eltra Corporation, Universal Oil Products Company/UOP, Inc., The Bendix Corporation, and Allied Overseas Finance Company.

Chevron-affiliated companies whose shares or debt securities are publicly traded are as follows: Amax, Inc.; Canyon Reef Carriers, Inc.; Chevron Capital N.V.; Chevron Capital U.S.A. Inc.; Chevron Investment Management Company; Chevron Oil Finance Company; Felix Oil Company; Gulf Oil Finance N.V.; and Long Beach Oil Development Company.

Companies in which Royal Dutch Petroleum Co. and The "Shell" Transport and Trading Co., P.L.C. directly or indirectly hold interests constitute the Royal Dutch/Shell Group of Companies. Royal Dutch/Shell Group companies whose shares or debt securities are publicly traded in the United States are Shell Oil Company, Shell International Finance N.V. and Shell Canada Limited.

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v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Allied-General Nuclear Services, Allied Chemical Nuclear Products, Inc. and Valley Pines Associates (hereinafter "AGNS") petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App.A, *infra*, 1a-12a) is reported at 839 F.2d 1572. The Claims Court's opinion (App.B, *infra*, 13a-54a) is reported at 12 Cl.Ct. 372.

JURISDICTION

The Court of Appeals judgment (App.C, *infra*, 55a) was entered on February 24, 1988. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Taking Clause in the Fifth Amendment of the United States Constitution provides:

> . . . nor shall private property be taken for public use, without just compensation.

Relevant provisions of the Atomic Energy Act of 1954 as amended, 42 U.S.C. §§2133, 2235, are set forth in App.D, *infra*, 57a-58a.

STATEMENT

The Claims Court's opinion sets out the facts, which were largely "stipulated and undisputed". (App.B, *infra*, 14a). The case was decided below on summary judgment.

A. THE STATUTORY SCHEME AND THE BARNWELL PLANT

1. Years ago, immediately after the Atomic Energy Act of 1954, the federal government began to encourage the private commercial development of nuclear power (App.B, *infra*, 15a-16a, 38a-39a,49a). With respect to the spent nuclear fuel that would be generated by electric utilities, the government guaranteed that there would be reprocessing (either government or commercial) to safely dispose of spent nuclear fuel. (C.A.App.26). *See Florida Power & Light* v. *Westinghouse Electric Corp.*, 826 F.2d 239, 243-253 (4th Cir. 1987), *cert. denied*, No. 87-1455.

To satisfy this obligation, the government for over two decades "encouraged and exhorted private commercial enterprises to enter the field of nuclear generation of power and of reprocessing of spent nuclear fuel" (App.B, *infra*, 16a). The government's encouragements to petitioners to enter the reprocessing business were "vigorous", "continual", and "amounted to inducement". (App.B, *infra*, 49a-52a). These myriad inducements to petitioners included of-

fers to supply initial baseloads of spent fuel to assist the economics in early years of operation of commercial reprocessing plants (C.A.App. 35-36); assurances that industry could build and operate commercial reprocessing facilities "subject only to the Commission's licensing requirements" (C.A.App. 36); and making available over 1500 acres of land in South Carolina, out of the land area on which the government operated its own nuclear reprocessing plant, which petitioners purchased as the site for their Barnwell Plant (C.A.App. 37, 180-181, 333-335). The government specifically encouraged petitioners to build the Barnwell Plant where and when petitioners did (*id.*).

These myriad inducements were part of a major government "program" that was deliberately designed to create reasonable investment-backed expectations "to encourage private industry to build and operate" commercial plants to reprocess spent nuclear fuel. (*See, e.g.*, AEC public statements, reports and Congressional testimony in C.A. App. 327, 328, 330, 319, 323-324, 332). Without these government inducements, petitioners would never have entered the reprocessing industry or invested over $200 million to build the Barnwell Plant. (C.A.App. 37, 181, 185, 192-193).

2. Two statutory steps are followed in the procedure for licensing private nuclear reprocessing facilities under the Atomic Energy Act: (a) granting a construction permit, and (b) issuing an operating license. *See Power Reactor Co.* v. *Electricians*, 367 U.S. 396 (1961); *Westinghouse Electric Corp.* v. *NRC*, 598 F.2d 759 (3d Cir. 1979).

A construction permit for the Barnwell Plant was applied for in November 1968 and issued in December 1970. The next month the Commission stated that "Construction is expected to be completed in 1973 and commercial operation is scheduled for 1974" (C.A.App. 118c). When construction was well advanced, in October 1973, petitioners applied for an operating license.

Final licensing of the Barnwell Plant was delayed in 1974, when the Commission began to prepare a generic environmental statement (GESMO) on the use of mixed oxide nuclear fuel—that is, fuel containing not only uranium but also the plutonium that would be recovered by reprocessing spent nuclear fuel. While the full GESMO review was underway,[1] concerns about the proliferation of nuclear technology escalated after India conducted a nuclear test in 1974 using plutonium recovered by reprocessing spent nuclear fuel. In October 1976, President Ford called for limited reevaluation of the expected role of private commercial reprocessing: "[T]he United States should no longer regard reprocessing of used nuclear fuel to produce plutonium as a necessary and inevitable step" (C.A.App. 121).

B. THE "MORATORIUM" ON COMMERCIAL REPROCESSING OF SPENT NUCLEAR FUEL

1. Overthrowing the long-standing policy of encouraging commercial reprocessing of spent nuclear fuel, President Carter specifically referred to the Barnwell Plant when he announced an abrupt reversal of government policy on April 7, 1977 (C.A.App. 128):

> [W]e will defer indefinitely the commercial reprocessing and recycling of the plutonium produced in U.S. nuclear power programs.

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[1] The Commission proposed interim licensing of reprocessing plants like the Barnwell Plant, pending hearings that would lead to final resolution of GESMO. The Second Circuit struck down such proposed interim licensing in May 1976 as incompatible with the National Environmental Policy Act (NEPA). *Natural Resources Defense Council* v. *NRC*, 539 F.2d 824 (2d Cir. 1976), *cert. granted*, 430 U.S. 944 (1977), *judgment vacated and remanded to determine mootness*, 434 U.S. 1030 (1978). The Solicitor General supported the petitions for certiorari in that case. But before the case could be argued in this Court, it was rendered moot by President Carter's 1977 ban on commercial reprocessing discussed *infra*.

> From my own experience, we have concluded that a viable and adequate economic nuclear program can be maintained without such reprocessing and recycling of plutonium. The plant at Barnwell, South Carolina, for instance, will receive neither Federal encouragement nor funding from us for its completion as a reprocessing facility.

At the accompanying press conference President Carter stated: "I hope that by this unilateral action we can set a standard and that those countries that don't now have reprocessing capability will not acquire that capability in the future" (C.A.App. 129). The Barnwell Plant was directly and immediately affected. (C.A.App. 237-238, 240-242, 245). A high Administration official informed AGNS that "the President picked a symbol and it was you" (C.A.App. 251, 194).

The Commission indefinitely postponed further GESMO hearings (42 F.R. 22964, 42 F.R. 57185). At the President's request, (42 F.R. 57186), the Commission then issued its order of December 23, 1977 terminating both the GESMO proceeding and the licensing proceedings for the Barnwell Plant. The order committed the Commission to reexamine its decision in approximately two years time, after completion of the International Nuclear Fuel Cycle Evaluation (INFCE), which had been initiated by the President's April 7, 1977 policy statement. *Mixed Oxide Fuel*, 6 NRC 861 (1977). The Commission stated, in an opinion issued later to explain its termination order:

> However, if the United States were to deny other nations the right to reprocess while continuing to pursue commercial reprocessing at home, it would undermine the credibility of our concern about the use of plutonium and our international intiatives toward non-proliferation.

Mixed Oxide Fuel, 7 NRC 711 at 718 (1978).

These statements made it clear, and the parties have stipulated (App.A, *infra*, 4a), that the government sacrificed the Barnwell Plant as a "bargaining chip" for international diplomacy.[2] The Commission expressly stated that it was not finding (7 NRC at 718 n.4), and indeed it has never found, that final licensing of the Barnwell Plant would be inimical to the common defense or security. There is nothing generically hazardous about reprocessing: Overseas reprocessing plants are in operation in France, West Germany, the United Kingdom and Japan (C.A.App. 229, 254). The United States continues its own reprocessing operations at its Savannah River Plant next door to the Barnwell Plant and at other government-owned facilities.

2. The validity of the Commission's December 1977 termination order was upheld, as a temporary "moratorium", in *Westinghouse Electric Corp.* v. *NRC*, 598 F.2d 759 (3d Cir. 1979).[3] The Third Circuit said it was beyond the Commission's authority to summarily terminate licensing proceedings without first passing on the merits of the applications (*id.* at 772, 774). The court concluded, however, that the NRC could validly impose a "moratorium" of about two years, so that the President might pursue his foreign policy objectives, until INFCE was completed. The Third Circuit admonished that "judicial recourse" would be available if the Commission failed to live up to its pledge to reexamine the matter at the conclusion of INFCE or if there was an "open-ended" moratorium "of unreasonable duration" (598 F.2d at 774).

3. Though INFCE ultimately reached conclusions favorable to reprocessing in March 1980 (C.A.App. 156-168),

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[2] *See also Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 102 n.15 (1983) ("The Commission noted that, in response to a Presidential directive, it had terminated separate proceedings concerning the possibility of recycling plutonium in mixed oxide fuel.")

[3] AGNS's brief in the Third Circuit expressly reserved any claim that the government's actions might constitute a taking of the Barnwell Plant requiring Just Compensation.

the Commission never reopened GESMO or the licensing proceedings. The White House notified the Commission in July 1980 that "it is the view of the President that the GESMO proceedings should remain terminated and . . . a reopening of GESMO would be inimical to national security and contrary to the non-proliferation and foreign policy interests of the United States" (C.A.App. 169).[4]

The Commission simply left in place its continuing open-ended moratorium on the licensing of commercial reprocessing facilities. In August 1980, despite its commitment to reexamine, the NRC instead called for public comment on reconvening GESMO (45 F.R. 53933). By this time, petitioners were involved in discussion with the government about its possible acquisition of the Barnwell Plant as an away-from-reactor storage facility (C.A.App. 187, 254-255, 194). In light of those ongoing discussions with DOE and the Administration's continuing stated hostility towards commercial reprocessing, AGNS requested an extension of time in which to respond to the Commission's August 1980 request for public comment on reconvening GESMO (C.A.App. 170). This was denied. Other interested parties requested that GESMO be reopened, but the Commission never reconvened GESMO.

The original basis for the 1977 "moratorium" was withdrawn in October 1981 when President Reagan announced (C.A.App. 32, 173):

> I am lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States. In addition, we will pursue consistent, long-term policies concerning reprocessing of spent fuel from nuclear power reac-

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[4] Earlier in 1980 AGNS representatives sought out several high Carter Administration officials who told them unequivocally that the outcome of INFCE would not change the President's position or cause him to reconsider the ban on domestic commercial reprocessing. (C.A.App. 254, 194).

> tors and eliminate regulatory impediments to commercial interest in this technology, while ensuring adequate safeguards.

Notwithstanding this statement, the Commission never reopened GESMO. Congress then enacted the Nuclear Waste Policy Act of 1982 (42 U.S.C. §§10101 *et seq.*), which provides for the disposal of spent nuclear fuel by transferring it to the government for storage as "waste".

The impact of President Carter's 1977 foreign policy decision, implemented by the Commission, was a regulatory taking of the Barnwell Plant. Over $200 million in out-of-pocket costs, reasonably invested by petitioners in the Plant in reliance on a major program of explicit government inducements, was destroyed.[5] Though the Barnwell Plant meets design criteria,[6] the statutory licensing scheme has been obliterated by an open-ended "moratorium" that bars the only viable private economic use of the Plant. Moreover, the government's regulatory actions after 1977 have ensured that the commercial reprocessing industry and the Barnwell Plant cannot be revived.

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[5] Over $200 million was spent to build the Plant (C.A. App. 27, 187). Before the 1977 ban the Barnwell Plant had a value of $394 million (C.A.App. 258). After the ban this was reduced to a salvage value of about $5 million (C.A.App. 258, 187, 195). As Secretary of Energy Schlesinger wrote in an April 1978 memorandum to President Carter: "AGNS has sunk costs of between $200M and $250M in the Barnwell plant which has no commercial prospects as a consequence of the decision to defer indefinitely reprocessing of spent fuel" (C.A.App. 266).

[6] A March 1983 Department of Energy (DOE) report stated: "Over 30 years of reprocessing in the U.S., in both government and commercial reprocessing plants, have demonstrated that such operations can be conducted safely with respect to both the workers and the general public, and without significant adverse impacts on the environment" (C.A.App. 155). And in 1984 the Comptroller General reported that Commission officials "were not aware of any fundamental problem with the existing facilities [at the Barnwell Plant] which would prohibit licensing the plant" (C.A.App. 153).

C. PROCEEDINGS BELOW

1. This suit was filed in the Claims Court in 1983 under the Tucker Act, 28 U.S.C. §1491, seeking Just Compensation from the United States for a taking of the Barnwell Plant. The case was decided at trial on cross-motions for summary judgment. AGNS' cross-motion was limited to the issue of the government's liability (not the measure of damages) under the Taking Clause.

The Claims Court held this suit "premature" and, in any event, that AGNS' "complaint does not set forth a claim for compensable taking" because "the property allegedly taken was generated under the existing regulatory system." (App.B, *infra*, 35a-37a). The opinion stated that the "foreseeability" of government action plays a "key role" in determining whether a compensable regulatory taking has occurred. (*Id.* 29a). The court concluded that valid regulations are by definition "foreseeable" (*id.* 30a) and that President Carter's 1977 ban on commercial reprocessing, "presumed to be valid, cannot be said to have involved considerations so unforeseeable that the public, rather than the plaintiff, should bear the burden of the loss." (*Id.* 31a). "Temporary taking" issues were held to be not "present in this case at this time". (App.B, *infra*, 23a n.5).

2. The Court of Appeals held that this suit was *not* "premature", that President Carter's 1977 ban on commercial reprocessing was "unforeseen", that "temporary taking" issues were presented in this case, and that no viable economic use can be made of the Barnwell Plant by its owners. (App.A, *infra*, 2a, 12a, 10a, 7a-8a, 1a, 6a). The court said that "the taking most likely occurred, if it occurred at all," between "April 7, 1977, when President Jimmy Carter announced his policy, and October 8, 1981, when President Ronald Reagan announced his". (*Id.* 7a). The Court of Appeals nevertheless concluded that AGNS had no "legally protected property right" in the Barnwell

Plant that could be the subject of a Fifth Amendment taking. (*Id.* 2a, 12a). Two major rationales were advanced to support this conclusion.

The Court of Appeals first invoked the so-called "nuisance" exception to the guarantee of Just Compensation. Relying on the "drastic" rule of *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and on the apparent assumption that the open-ended "moratorium" on commercial reprocessing of spent nuclear fuel is forever valid and reasonable, the court concluded that "the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public." (*Id.* 8a). The Court of Appeals held that any government regulation, whose stated purpose is to prevent injury to "health, safety, and welfare", may completely destroy private property without Just Compensation. (*Id.* 9a-10a).

The Court of Appeals ruled in the alternative that AGNS' "antecedent acceptance of the regulatory scheme" meant that the Barnwell Plant was not "property" before final licensing. (*Id.* 10a). The major program of government inducements that was intended to create reasonable investment-backed expectations and encourage the construction of the Barnwell Plant was dismissed by the court as mere "jawboning", irrelevant to the issue of "property" in the absence of an express or implied "contract". (*Id.* 11a-12a). The Court of Appeals accordingly ordered that the complaint be dismissed with prejudice.

REASONS FOR GRANTING THE PETITION

This suit involves principles of high national importance in the history of our times. Outlawing commercial reprocessing of spent nuclear fuel, the President of the United States himself took the decisive action to destroy the Barnwell Plant. Like President Truman's historic seizure of the

steel mills, this is an event calling for this Court's examination.

The case presents important and recurring questions about regulatory taking cases that this Court should decide. To begin with, the Court of Appeals decision has profound implications for regulatory takings law in its holding that the so-called "nuisance" exception applies to bar Just Compensation, even though government regulation destroyed all viable private economic use of the Barnwell Plant. The scope of the "nuisance" exception to the Taking Clause is an important and recurring question that was left open in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 107 S.Ct. 1232 (1987), and *First English Evan. Luth. Ch.* v. *Los Angeles Cty.*, 107 S.Ct. 2378, 2384-2385 (1987). This Court should now decide that issue. The "nuisance" exception does not properly apply here, where the government first encouraged construction of the Barnwell Plant, and then totally destroyed its value, not because the Plant itself was dangerous but because of foreign policy concerns about *other* property overseas.

The sweeping alternative ruling by the court below, that the virtually completed Barnwell Plant is not "property" before final licensing, allows the government to destroy the Plant by overregulation without paying Just Compensation. This ruling is unjust and in conflict with the decisions of this Court that the existence of a licensing scheme does not automatically deprive interests of their status as "property" before final licensing. Other factors must be considered under this Court's rulings, as we show below, including the impact of the government's inducements and AGNS' legally protected rights under the specific statutory licensing scheme. *See Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *Westinghouse*.

The opinion of the Federal Circuit essentially holds that valid regulatory action under a licensing scheme, by definition, can never work a compensable taking of "prop-

erty". Yet even under this standard, there was a compensable taking of AGNS' property. The court created a "catch-22" and seriously misconstrued regulatory takings law, as set out in *Nollan* v. *California Coastal Com'n*, 107 S.Ct. 3141 (1987), when it ignored the Third Circuit's ruling in *Westinghouse* and simply *assumed* that the open-ended "moratorium" was forever valid for purposes of determining whether it worked a regulatory taking. The opinion below also misinterprets "temporary takings" law and procedure as defined by this Court in *First English* and in the opinions in *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981).

The overriding interests of justice, as well as sound analysis, compel the conclusion that there was a taking of the Barnwell Plant. The Court of Appeals decision is in conflict with recent Taking Clause decisions of this Court and with the Third Circuit's decision in *Westinghouse*. It seriously departs from the trend and movement of the law recognizing the need to award Just Compensation to serve the interests of justice.[7] This case presents important and recurring questions about regulatory takings that are of national significance. Review and reversal by this Court are clearly called for.

I. THIS COURT SHOULD NOW DECIDE THE PROPER SCOPE OF THE "NUISANCE" EXCEPTION TO THE REQUIREMENT OF JUST COMPENSATION

The Court of Appeals decision holds that any government regulation, whose purpose is to prevent injury to "health, safety, and welfare", may completely destroy pri-

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[7] The Executive Branch recently acknowledged that these trends in the law must be taken into account in the budgetary process and other planning by federal government departments and agencies. See President Reagan's Executive Order 12630 "Government Actions and Interference with Constitutionally Protected Property Rights" (March 15, 1988), issued after the Court of Appeals decision. 53 F.R. 8859 (March 18, 1988).

vate property without Just Compensation. (App.A, *infra*, 8a-10a). This ruling represents a vast and unwarranted expansion of government power to destroy private property without compensation, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety and welfare". This Court should now decide the proper scope of the "nuisance" exception to the guarantee of Just Compensation, which is an important and recurring question that was left open by this Court last year in *Keystone* and *First English*.

1. The Court of Appeals was quite wrong to hold that *Keystone* created a broad "nuisance" exception to the guarantee of Just Compensation by

> dust[ing] off *Mugler* and put[ting] it back on its pedestal, while reducing *Pennsylvania Coal Co.* v. *Mahon* as a precedent pretty much to its own peculiar facts. (App.A, *infra*, 8a-9a).[8]

The majority in *Keystone* found substantial value left in the property there. 107 S.Ct. at 1246-1251. Whether the "nuisance" exception applies, where there is a complete destruction of property value, was left open in *Keystone* and *First English*, 107 S.Ct. at 2384-2385.

Over sixty years of this Court's jurisprudence has consistently recognized that a taking occurs when government regulation "goes too far" and forecloses "all use of property". *First English*, 107 S.Ct. at 2389; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). The Court of Appeals expansive reading of the "nuisance" exception slights this well-established jurisprudence and eviscerates the law of regulatory takings.

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[8] The opinion below improperly denigrates the importance of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), and ignores the impact of later decisions like *Nollan* and *First English* in defining regulatory takings.

2. As a matter of law and sound policy, the "nuisance" exception *should not* apply to bar Just Compensation in this case where government regulation destroys all viable economic use of private property.[9] Where private property is thus destroyed, the public is "loading upon one individual more than his just share of the burdens of government". *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893).

The concerns underlying the Fifth Amendment apply with special force in this case, where a major program of government inducements caused petitioners to construct the Barnwell Plant at enormous expense, to take over a function (safe disposal of spent nuclear fuel) that otherwise would have to be performed by the government itself. Where the government encourages the construction of private property for a public purpose, and then outlaws the only viable economic use of the property for foreign policy reasons intended to benefit the Nation as a whole, the central policy of the Just Compensation clause clearly applies: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 107 S.Ct. at 3147 n.4 (1987); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

3. The Court of Appeals relied on an "injury"/"benefit" distinction to define the scope of the "nuisance" exception (App.A, *infra*, 9a-10a). But under that standard, the "nuisance" exception has no proper application in this case. Neither President Carter nor the Commission ever found that the Barnwell Plant itself threatened "injury to the public welfare". It was other property overseas that posed

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[9] The majority in *Keystone* did not reach the issue, because it found substantial value left in the property there. But the four dissenting Justices indicated that the "nuisance" exception should not apply "to allow complete extinction of the value of a parcel of property". 107 S.Ct. at 1257-1261 (Rehnquist, C.J., dissenting).

such a threat, in the view of President Carter. When he sacrificed the Barnwell Plant in 1977, President Carter did not say that he was banning a dangerous nuisance-like activity at Barnwell; instead, he sought to obtain a *general public benefit* by setting "a standard [so that] those countries that don't now have reprocessing capability will not acquire that capability in the future" (C.A.App. 129). The "moratorium" was imposed, not because the Barnwell Plant itself was dangerous, but because of concerns about nuclear proliferation in other countries overseas.

Over 98% of the value of the Barnwell Plant was destroyed when the government reversed its policies and symbolically sacrificed the Plant as a "bargaining chip" to further our Nation's foreign policy goals on nuclear nonproliferation. *See Dames & Moore* v. *Regan*, 453 U.S. 654, 691 (1981) (Powell,J., concurring: government "must pay just compensation when it furthers the Nation's foreign policy goals" by using private property as "bargaining chips"). Federal licensing authorities have *never* held that the Barnwell Plant posed a hazard or that issuance of an operating license for the Plant was inimical to the "common defense". The operation of the government's Savannah River Plant for reprocessing of *government-owned* nuclear fuel, next door to the Barnwell Plant, makes it clear that this case has never involved a "noxious" use of the specific Barnwell property or a "nuisance" threat to public health or safety.

There is no basis in fact for the Court of Appeals to apply a "nuisance" exception to the Barnwell Plant *on a continuing basis*. The open-ended "moratorium" on commercial reprocessing has long been invalid, under the Third Circuit's decision in *Westinghouse*. At President Carter's insistence, the Commission left the "moratorium" in place, notwithstanding the fact that the final INFCE report concluded in March 1980 that commercial reprocessing posed no unreasonable threats to nuclear nonproliferation (C.A.App. 156-168). The Commission continued the mor-

atorium even after President Reagan in October 1981 withdrew any Presidential concerns about the "common defense", which were the original basis for the "moratorium" (*see* App.A, *infra*, 9a). The open-ended "moratorium", which was left in place by the NRC and has continued for many years (see pp.6-8 *supra*), has no foundation in court decisions or Presidential pronouncements. The moratorium provides no proper basis for invoking an on-going "nuisance" exception to the guarantee of Just Compensation.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON TAKING CLAUSE "PROPERTY"

The virtually completed Barnwell Plant is a reality. As a matter of common sense, it clearly is "property". The Court of Appeals ruling, that the Barnwell Plant is not "legally protected property" before final licensing, is in direct conflict with the Third Circuit's interpretation of the statutory licensing scheme in *Westinghouse*. Moreover, the Court of Appeals denigration of the importance of government inducements in creating "legally protected property" is at war with the principles of *Kaiser Aetna*, *Monongahela Navigation*, and other decisions of this Court.

1. The sweeping ruling by the Court of Appeals that the Barnwell Plant is not "property" before final licensing, if accepted, would mean that the Taking Clause provides no remedy if the government destroys the Barnwell Plant by overregulation before final licensing. Neither reason nor authority supports this unjust result.

The Court of Appeals reasoned that AGNS' "antecedent acceptance of the regulatory scheme" (App.A, *infra*, 10a) meant that AGNS took the risk that the Barnwell Plant would be destroyed by valid regulation. One could say, under the Court of Appeals' rationale, that any valid statute (even an express statutory reversal) can *never* work a taking because, by definition, any valid statute is part

of an "antecedent regulatory scheme" that includes federal and state constitutional provisions empowering the government to make all necessary and proper laws and to change them (*e.g.*, U.S. Const. Article I, section 8). But this sort of "antecedent acceptance of the regulatory scheme" has never barred recovery under the Taking Clause. Government powers otherwise valid are *subject to* the Taking Clause ban on taking private property without Just Compensation. This is why statutes otherwise valid may so affect private property rights as to work a taking requiring Just Compensation. *See, e.g., United States* v. *Security Industrial Bank*, 459 U.S. 70, 74-75 (1982). "It is a separate question * * * whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto* v.. *Teleprompter Manhattan*, 458 U.S. 419, 425-426 (1982).

Nor is the presence of a licensing scheme dispositive. The court below ignored AGNS' specific "legally protected property" interests (see pp. 18-22 *infra*) and held that, by definition, Taking Clause "property" could not exist before final licensing. This is in conflict with the rulings of this Court that, while many kinds of property require some sort of license before they can be used, that does not automatically deprive these interests of their status as "property" before final licensing occurs.[10] As this Court

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[10] The Court of Appeals decision is also in conflict with earlier lower court decisions holding that the mere presence of a licensing scheme does not automatically deprive interests of their status as "property" before final licensing. *See, e.g., Florida Rock Industries* v. *United States*, 791 F.2d 893 (Fed.Cir. 1986), cert. denied, 107 S.Ct. 926 (1987) [case remanded: denial of mining permit may constitute a taking]; *Skaw* v. *United States*, 740 F.2d 932,940 (Fed.Cir. 1984) [court holds mining claims would be subject to Just Compensation, despite lack of state mining permit to exercise those rights]; *Laney* v. *United States*, 661 F.2d 145, 150 (Ct.Cl. 1981) [case remanded: refusal to grant permit necessary to allow any economic use of island may constitute a taking]; *Benenson* v. *United States*, 548 F.2d 939 (Ct.Cl. 1977) [regulatory in-

stated in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 127 (1985): "[W]hen a permit is denied and the effect of the denial is to prevent 'economically viable' use of the [property] . . . it [can] be said that a taking has occurred."[11] That is AGNS' case.

Whether a compensable regulatory taking of "property" occurred turns on the "several factors" listed in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978): "[t]he economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with distinct investment-backed expectations, . . . [and] the character of the governmental action". *See also Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). The Court of Appeals decision—that the bare existence of an "antecedent" licensing scheme is dispositive and forecloses the existence of Taking Clause "property" before final licensing—slights these standards and impermissibly narrows the definition of Taking Clause "property".

2. The other factors present in this case show that petitioners clearly have legally protected "property" interests in the Barnwell Plant, before final licensing. Over 98% of the value of the Plant was destroyed by the government's 1977 ban on commercial reprocessing. The out-of-pocket investment of over $200 million, embodied in the virtually completed Barnwell Plant, was reasonably in-

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decision held a compensable taking of a hotel, despite extensive pre-existing regulatory scheme regulating many aspects of hotel business]. Accord: L. Tribe, *American Constitutional Law* §9-4 at p.465 (1978) [pointing out the fallacy of the argument that government regulation can define "property" out of existence by the mere device of characterizing the regulation as a "condition"].

[11] The old "license" cases cited by the government below are readily distinguishable, since none of them involved government inducements or a statutory licensing scheme creating "property" expectations. Moreover, the "license" cases cited by the government all involved licenses to use public lands or waterways, not private property as in AGNS' case.

vested by AGNS based on a major program of government *inducements*. The "character" of the 1977 government action was that it made an abrupt unforeseeable change in the law, that specifically targeted the Barnwell Plant and deliberately destroyed the only viable private economic use of the Plant, solely for foreign policy reasons.[12] The impact of the government's inducements, and the meaning of the statutory licensing scheme as interpreted by the Third Circuit in *Westinghouse*, are particularly significant in establishing that the virtually completed Barnwell Plant is indeed "legally protected property".

(a) Government Inducements.

Our basic submission is that the "property" at stake is the single-purpose Barnwell Plant itself, which embodies (even before final licensing) petitioners' reasonable investment-backed expectations that the government would continue to support and encourage (not outlaw) commercial reprocessing. For over 20 years, the government ran a major program of inducements that was *specifically intended* to create these "reasonable investment-backed expectations". Petitioners' "legally protected" property in the Barnwell Plant includes these reasonable investment-backed expectations, based on explicit government induce-

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[12] AGNS' case presents a far more compelling instance of a regulatory taking than *Duquesne Light Co.* v. *Barouch* (S.Ct. No. 87-1160) in which probable jurisdiction was noted on March 7, 1988. The statute involved in *Duquesne* did not involve any basic change in the regulatory framework, since that statute (§1315 of the Pennsylvania Public Utility Code) was held by the Pennsylvania Supreme Court to have "reaffirmed" the preexisting policy of the law of Pennsylvania (J.S. in No. 87-1160 at 25a). By contrast, President Carter's actions in AGNS' case completely reversed the prior regulatory law and policy. To ensure well-considered development of Taking Clause law, as well as just and uniform results to the parties, this Court may find it helpful to have these various strands of regulatory takings law under consideration at the same time. This is an additional reason for granting certiorari; and if certiorari is granted, then for scheduling argument of AGNS' case in tandem with No. 87-1160.

ments, just as the trade secret owner's reasonable expectation of confidentiality (based on government assurances) was part of the property in *Monsanto*; and the lock and dam owner's franchise to collect tolls (based on government inducements) was part of the property in *Monongahela*; and the marina owner's reasonable investment-backed expectation (based on government "acquiescence") of a "right to exclude" the public from his marina even after connecting it with navigable waters was part of the property in *Kaiser Aetna*.

The out-of-pocket investment-backed expectations, embodied in the Barnwell Plant, are what make the Plant "property" in the normal sense of a valuable product of "labour and invention" (*Monsanto*, 467 U.S. at 1003, citing 2 W. Blackstone, *Commentaries* *405). This case involves "values which result from [the claimant's] expenditures or activities" (*United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280-281 (1943)). These values are part of petitioners' "property" under the law generally, as well as under South Carolina state law. These valuable "property" interests were taken, by an abrupt change in regulatory law, when the "moratorium" on commercial reprocessing was first imposed for foreign policy reasons.

The opinion of the Court of Appeals fails to come to grips with (or even mention) *Kaiser Aetna*, *Monsanto* and *Monongahela*, which found compensable takings of "property" created in reliance on government assurances, in the absence of any express or implied contract. The Court of Appeals ruling that the Barnwell Plant is not "property" in the absence of an express or implied "contract", notwithstanding the major program of government inducements that deliberately created investment-backed expectations and caused the Barnwell Plant to be built, is thus in conflict with the principles of *Kaiser Aetna*, *Monsanto* and *Monongahela*. The court's ruling that the major program of government inducements is irrelevant to the existence of "property" (App.A, *infra*, 11a-12a) reduces

itself to the proposition that valid regulation under an "antecedent regulatory scheme" (even if unforeseeable)[13] can never work a compensable taking of "property". This holding is erroneous (see pp. 16-20 *supra*), it has vast implications for federal takings law, and it calls for plenary review by this Court.

(b) The Statutory Licensing Scheme.

Two "property" interests in the Barnwell Plant are created directly by the Atomic Energy Act licensing scheme. One "property" interest recognized by the Third Circuit in *Westinghouse* is that, in the circumstances of this case, the statute itself requires that

> *the NRC must issue a license unless* it determines that "the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public." (598 F.2d at 772)

Only for cause (for statutory reasons of "common defense/public health and safety") could the use of the Barnwell Plant be prohibited. Yet no such finding has ever been made by the Commission.

The other "property" interest in the Barnwell Plant, created by the statutory licensing scheme and recognized in *Westinghouse*, is protection against an open-ended "moratorium" of the kind that now exists:

> Of course, the NRC may not completely terminate license application proceedings without passing on the merits of the applications, simply by declaring an open-ended moratorium. * * * When and if it ever becomes

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[13] The opinion of the Court of Appeals states (App.A, *infra*, 10a) "However, the statute required the agency to take into account the common defense and security of the nation in passing on the licenses. We cannot believe that this did not include the unforeseen as well as the predictable." The record shows that the 1977 ban on commercial reprocessing was completely unforeseeable (C.A.App. 181, 186-187, 192-193, 201, 227-229).

> apparent that the NRC has *de facto* denied the license applications despite the applicants' compliance with the pertinent regulations and without making a finding of inimicality, or that the moratorium is of unreasonable duration, judicial recourse will be available to the aggrieved parties. [*Westinghouse*, 598 F.2d at 774].

The impact of the open-ended "moratorium" has been to destroy these legally protected rights that the *Westinghouse* court recognized exist in the Barnwell Plant before final licensing. The Court of Appeals ruling, that no compensable "property" exists in the Barnwell Plant before final licensing, is thus in direct conflict with the Third Circuit's interpretation of the statutory licensing scheme in *Westinghouse*.

3. Even under the Court of Appeals' premise—that what is affected by valid regulatory action (under a licensing scheme) is not "property"—there was still a compensable taking of the Barnwell Plant "property" in this case. The court improperly ignored the fact that the open-ended "moratorium" that now exists has long been invalid under the Third Circuit's ruling in *Westinghouse*. Even if petitioners' "property" in Barnwell did not come into existence until the "moratorium" became invalid, *Westinghouse* establishes that the "moratorium" became invalid long ago. Thus even under the Court of Appeals' flawed analysis, a compensable taking of the Barnwell Plant "property" occurred years ago, when the "moratorium" extended to "unreasonable duration". 598 F.2d at 774.

III. TAKING CLAUSE LAW AND PROCEDURE, AS DEFINED IN *NOLLAN* AND *FIRST ENGLISH*, WERE SERIOUSLY MISCONSTRUED BY THE COURT OF APPEALS

The opinion of the Court of Appeals contains rulings that, if allowed to stand, would utterly subvert the law and procedures under which courts decide Just Compen-

sation cases. These are important issues of national significance, since the Tucker Act (28 U.S.C. §1491) makes the Claims Court and the Court of Appeals below the primary forums for resolving Just Compensation claims against the United States.

A. Validity of Regulations in Takings Cases

The Court of Appeals opinion creates a "catch-22" to bar Just Compensation claims against the United States. The court interpreted the "nuisance" exception, and the meaning of Taking Clause "property", to mean that "reasonable" and valid regulations within the "regulatory scheme" by definition cannot work a compensable taking of property. (App.A, *infra*, 8a, 10a). The implication is that only "unreasonable" and invalid regulations can work a compensable taking. But according to the Court of Appeals, under its jurisprudence,

> The wisdom and propriety of this action is of course not before us. *Florida Rock Industries, Inc.* v. *United States*, 791 F.2d 893 (Fed.Cir. 1986), *cert. denied*, 107 S.Ct. 926 (1987). [App.A, *infra*, 4a].

Valid and "reasonable" regulations work no compensable taking, according to the Court of Appeals, and it will not even consider the "wisdom and propriety" of the open-ended "moratorium" to see whether it has now been extended for so long that it is "unreasonable" and invalid. This impermissibly erodes the law of regulatory takings.

When a suit is brought for Just Compensation, it seeks money damages not injunctive relief. Moreover, injunctive relief is generally not available from the Court of Appeals below (or the Claims Court) under the limited jurisdiction of the Tucker Act, 28 U.S.C. §1491. *See, e.g., United States* v. *Testan*, 424 U.S. 392 (1976). Yet the Court of Appeals below (and the Claims Court) clearly have jurisdiction to decide any and all issues that bear on the question whether

Just Compensation is owing in a properly brought regulatory taking case.

The open-ended "moratorium" on commercial reprocessing, under the Third Circuit's ruling in *Westinghouse*, has been invalid for many years now. *See* 598 F.2d at 774, 772. To the extent this fact bears on the Taking Clause issue, the courts below clearly should have considered it. This Court held in *Nollan* that regulations worked a compensable taking of property because the regulations were invalid. The opinion and decision of the Court of Appeals are in conflict with *Nollan* when the Court of Appeals failed even to consider "wisdom and propriety" for purposes of determining whether "property" exists or whether the open-ended "moratorium" on commercial reprocessing has been extended for an unreasonable length of time so that it fails to "substantially advance legitimate state interests" (*Nollan*, 107 S.Ct. at 3146-3147) and thus works a compensable taking of property.

B. "Temporary Takings" Law

The opinion below also contains an ambiguous suggestion that, assuming there is an on-going "temporary taking" of the Barnwell Plant, federal law imposes a novel "exhaustion" requirement that the owners of the Barnwell Plant must now *reapply* to the federal government, to give "an opportunity for it to show what its intentions are", before this suit may proceed further. (App.A, *infra*, 6a). To the extent that the Court of Appeals has created an "exhaustion" requirement which would apply even where the Barnwell Plant is recognized as Taking Clause "property", the Court of Appeals has seriously misinterpreted the law of "temporary takings".

There is no federal statute, or any prior case law, that supports a novel "exhaustion" requirement in cases of ongoing "temporary takings" of "property" by the federal government to give "the alleged taker * * * an opportunity for it to show what its intentions are". To the

contrary, a settled principle of "takings" law is that "Exhaustion of review procedures is not required." *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985).

"Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English*, 107 S.Ct. at 2389. But "the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 636 at 653, 658 (1981) (Brennan, J., dissenting for himself and Stewart, Marshall and Powell, JJ.) [footnotes omitted]; and see *id.* at 633-634 (Rehnquist, J., concurring). This gives the government a choice: It may pay for a permanent taking or, if it were still practicable to do so, it may rescind the regulation, restore the regulatory *status quo ante* which existed before the regulation worked a "taking", and pay for only a temporary taking. *See id.* at 653 n.19. Accord: *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S.Ct. 2561, 2573 & n.4 (1986) (White, J., dissenting for himself and Burger, C.J.).

The impact of the open-ended "moratorium" on commercial reprocessing, and the whole course of government actions since 1977,[14] makes it clear that there has been a

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[14] The series of government actions taken since 1977 makes it clear that the government has no intention of ever trying to restore the regulatory *status quo ante* that existed before the 1977 ban, or even attempting to limit its liability to "temporary taking" damages. The Nuclear Waste Policy Act of 1982, and the Commission's November 1985 reaffirmation of the old 1977 ban (50 F.R. 45598 (November 1, 1985)), confirm the death of commercial reprocessing and the start of an entirely different regime governing the disposal of spent nuclear fuel.

permanent taking of the Barnwell Plant. The Court of Appeals stated that "the taking most likely occurred, if it occurred at all" between "April 7, 1977, when President Jimmy Carter announced his policy, and October 8, 1981, when President Ronald Reagan announced his". (App.A, *infra*, 7a). Going back to the government at this late date will not aid at all in defining exactly when the taking *started*. The open-ended "moratorium" is still in effect and the taking is a continuing one. *San Diego Gas*, 450 U.S. at 653, 658.

CONCLUSION

This case cries out for justice under the Constitution. When the government switched from promotion to prohibition of commercial reprocessing, it worked a classic taking of the Barnwell Plant. The Court of Appeals decision sanctions an unjust result, it seriously distorts regulatory takings law, and it is in conflict with the Third Circuit's ruling in *Westinghouse* and the decisions of this Court.

Traditionally, this Court has held that a compensable "taking" occurs when government regulation of private property *either* (a) does not "substantially advance legitimate state interests", *or* (b) denies an owner "economically viable use of his land". *See, e.g., Nollan*, 107 S.Ct. at 3146-3147. The Court of Appeals failed even to consider whether the open-ended moratorium has been extended so long that it works a taking under the first test, and it has defined the "nuisance" exception and Taking Clause "property" so as to eviscerate the second test. Such an important change in Just Compensation law calls for plenary review by this Court.

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals for the Federal Circuit

87-1481

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED CHEMICAL NUCLEAR PRODUCTS, INC. and VALLEY PINES ASSOCIATES,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: February 24, 1988

Before RICH, *Circuit Judge,* Nichols, *Senior Circuit Judge,* and SMITH, *Circuit Judge.*

NICHOLS, *Senior Circuit Judge.*

Beside a stream in South Carolina stands one of the most remarkable white elephants in our American history, rich as it is in similar constructions. It is a plant which is completely useless but has absorbed, according to its owners, over $200,000,000 in their capital plus unstated amounts in public funds. The owners seek to shift their loss to the United States, making use of the consent granted in the Tucker Act, 28 U.S.C. § 1491, to sue the government for just compensation in instances of takings of property "for public use." The Claims Court dismissed the suit, without prejudice, for want of "jurisdiction" because it was premature but held, in the alternative, if the court had jurisdiction, the suit must be dismissed "with

prejudice" because the property allegedly taken "was generated under the existing regulatory system." We hold that if premature at all, the suit was so as to only part of the claim, and the prematurity was not jurisdictional. Therefore, we turn to the alternative decision and hold the court had jurisdiction to make it and that the claimant had no legally protected property right to operate the plant, which could have been the subject of a fifth amendment taking, as against the fear it would injure the national security. Therefore, we affirm the dismissal with prejudice.

Background

The Claims Court decision, 12 Cl. Ct. 372 (1987), embodied a full statement of the factual background, expanded in a factual appendix into great detail, service by the judge beyond the call of duty in a case such as this was, of cross-motions for summary judgment. It is not necessary for us to duplicate all this material, and we will confine our summary to the minimum necessary for understanding our legal holding.

Before the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2011-2282, the United States Government, which had discovered how to achieve nuclear fission, and exploited it in the world's first atom bomb, pretty much kept to itself even the development of peaceful uses. The AEA had, however, as one of its objects, the enlistment of private capital, which was supposedly better able to control its costs, in the development of electric power from nuclear fission. A number of private companies came into being which were to feed electricity into the ordinary power grid, but with such fission as the source, instead of combustion, or the fall of water. One of the problems the newborn companies faced was the disposal of their "spent fuel." The government agreed to take care of that. The best way to do it appeared to be a recycling process. The fuel, enriched uranium dioxide, became "spent" in the course

of its use, *i.e.*, no longer able to produce power, but radioactive and dangerous still. It had, in part, been transmuted into plutonium. Disposal was difficult. The government therefore promised the power producers to recycle the spent fuel. This involved separating the plutonium from other components, and it could be used for military purposes or to make more fuel. The plant involved in this case is solely to perform this recycling operation and, except for minor structures which have been dismantled and carried away, it is nearly useless for anything else.

Under the AEA it could be constructed and operated only under separate licenses which the Nuclear Regulatory Commission (NRC) could grant or withhold, taking into account, among other things, whether issuance "would be inimical to the common defense and security or the health and safety of the public." 42 U.S.C. §§ 2133(d), 2134(d). The parties agree that the NRC "induced" private industry to undertake the awesome reprocessing task, the motive of the NRC being, of course, its commitment to the power producers to dispose of their spent fuel. It believed that this operation, too, could be best performed by private industry with private capital. Besides jawboning, the "inducement" took the form of free land as well as technical assistance.

The appellants, being awarded a construction license in 1970, commenced construction in 1971 on the donated land at Barnwell, South Carolina, after which the plant is named. In 1974 the government commenced to process the operating license and besides, to prepare an environmental impact statement, here called GESMO. This is necessary for every government-sponsored project such as this (42 U.S.C. § 4321 and ff), and has never been completed.

While the record is replete with government "inducement," we note an entire absence of any evidence that the government in any manner, express or implied, con-

tracted to share whatever risks there might be in the venture, to warrant that it would succeed, or otherwise shield it against vicissitudes.

Apparently, in connection with the GESMO study, concern began to be expressed as to the impact this plant might have on the problem of "nuclear proliferation." While every application of nuclear fission is fearsome to many, the possibility that nations, whose slogan is "death to the United States," having irresponsible, unprincipled, and bloody-handed dictators, might get nuclear weapons, is pretty near the top of anyone's list of dreads. The bearing of this on the Barnwell plant was evidently not seen when its construction was licensed. Since the recycling produces plutonium, anyone who had a peaceful plant powered by nuclear fission might, if he also had a recycling plant, obtain a nuclear weapon. Thus, checking the use of the recycling process in foreign countries was vital to the control of "nuclear proliferation," and how could the United States assume the lead in such an effort if it ran a recycling plant itself?

On April 7, 1977, President Jimmy Carter announced that because of the above concerns "we," the United States of America, will "defer indefinitely the commercial reproducing and recycling of the plutonium produced in the United States nuclear power programs." Accordingly, a freeze took effect in the processing of the operating license for the Barnwell plant, and in the GESMO. The wisdom and propriety of this action is of course not before us. *Florida Rock Industries, Inc.* v. *United States,* 791 F.2d 893 (Fed. Cir. 1986), *cert. denied,* 107 S. Ct. 926 (1987).

The parties have stipulated that the United States used Barnwell's operating license as a "bargaining chip." This we do not understand to mean that the operating license was actually bargained away to purchase some agreed concession from some foreign country. *Cf. Gray* v. *United States,* 21 Ct. Cl. 340 (1886). The case has not been argued

on that basis. For the taker to take A's property right and grant it to B in return for consideration B has provided to the taker, is a fifth amendment case we do not have here, as our predecessor had in the *Gray* case. Rather, it was that the pursuit of reprocessing by the United States would undermine the credibility of its efforts to discourage production of plutonium abroad. The "bargaining chip" terminology is confusing and something more specific would have been more helpful to the court.

On October 8, 1981, President Reagan announced he was "lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States." However, there has been no action by the NRC or the Department of Energy to revive consideration of the operating license or the GESMO. The government used the plant for R&D from 1977 to 1983, but without profit to Allied-General. Counsel stated that some salvageable portions of the plant have been removed and carried off, but most of it stands there, empty and forlorn. Allied-General has not made any use of what the trial court calls "statutory procedures" to reactivate the license, and that court thinks that if no more, Allied-General should insist on and obtain a final executive decision on its license application. The court cites Supreme Court authority that a taking claim for a regulatory action is premature until one knows "the nature and extent of permitted development."

Among various lawsuits in which Allied-General has been embroiled, respecting Barnwell, one is particularly important. The others can be left to the trial court's summary. Allied-General was a party to the case reported as *Westinghouse Electric Corp.* v. *United States,* 598 F.2d 759 (3d Cir. 1979). In that case, the freeze, called a moratorium, was reviewed as to its propriety under the law. It had then been of about two years' duration. The court held it well within the purpose of the AEA to consider holding up the license because of the goal of securing international

nonproliferation. It opined, if the application was held so long it appeared to be *de facto* denied, and if appropriate findings were not made, judicial recourse would be available. This was not a suit for just compensation, and was not considered under that aspect.

Discussion

I

The trial court's analysis is for the most part sound and its consideration of the precedents exhaustive. We refer the reader to it, but do not adopt it as our own opinion. We agree with the trial court that it is not reasonable to ask the court to assess damages for a taking when it is not known just what interest is taken, or when, or for how long, and these are matters best left to be stated by the alleged taker itself. If it refuses to say, inferences can be drawn, as the Third Circuit stated. It may, however, not be at all reasonable to ask the claimant to delay in filing his suit. If, as here, a taking claim is stated, the court has jurisdiction of the subject matter and it may do a great injustice if it dismisses, even without prejudice, a claim brought almost 6 years (the statutory period of limitations) after it first arguably accrued. As we did in *Aulston* v. *United States,* 823 F.2d 510 (Fed. Cir. 1987), here the sensible thing to do would be to retain jurisdiction and suspend further action pending a proper application to the alleged taker and an opportunity for it to show what its intentions are, except that the claim fails on other grounds. This is particularly true when, as here, the taker may end up the unwilling purchaser of a $200,000,000 but useless facility.

Subject-matter jurisdiction of the federal courts is initially determined according to the "well-pleaded complaint." *Gronholz* v. *Sears, Roebuck and Co.,* 836 F.2d 515, 5 USPQ2d 1269 (Fed. Cir. 1987). The court may determine, of course, whether it lacks jurisdiction and the well-

pleaded complaint affords a sufficient starting point in answering such a question. In assessing the complaint, the court is not precluded from considering other threshold issues as well, all with the goal in mind of determining the court's jurisdiction. *Id.* The exhaustion requirement is not, strictly speaking, a matter of jurisdiction. *United States* v. *Priority Products, Inc.,* 793 F.2d 296, 4 Fed. Cir. (T) 88 (1986). Even if the statement of the claim in the instant complaint showed on its face, which it does not, that administrative remedies then existed which had not been exhausted, the fact still remains that between April 7, 1977, when President Jimmy Carter announced his policy, and October 8, 1981, when President Ronald Reagan announced his, no administrative remedy existed not obviously futile and a waste of time. During that period, the taking most likely occurred, if it occurred at all. If it occurred during that period, there is no mystery what the taker took. It took the entire fee. On the other hand, it is arguable from the complaint that a temporary taking occurred well before the permanent one, even if no permanent taking occurred. The Supreme Court has held, in a decision that came *after* the trial court decision, that any lapse of time when use of property was delayed by the deliberations of administrative bodies must, if it qualified otherwise, be dealt with as a temporary taking. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 107 S. Ct. 2378 (1987). The decision torpedoes the assumption of the California courts that a dispute over what the alleged taker can do without incurring just compensation liability must, if the taker is wrong, be resolved by injunctive relief alone, with no money damages, because otherwise the alleged taker is made into a real one without ever intending to take that role. In federal law, of course, the governmental entity is made into an involuntary purchaser and may end up owning property it does not want, by operation of the Tucker Act, which does not have a California counterpart. The idea of a tem-

porary taking while deliberations drag on is applicable to federal acts and obviously not anticipated by the trial court.

Accordingly, we hold that the Claims Court had jurisdiction. In view of this, the trial court properly passed beyond the threshold exhaustion issue to examine whether the expectation of being awarded an operating license was a property right protected by the fifth amendment.

II

We think the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public. *Mugler* v. *Kansas*, 123 U.S. 623 (1887). Too late to have been noted by the trial court, there has been an interesting development regarding that century-old case. A major constitutional holding in its day, its authority had been thought impaired by later cases and particularly by *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). We touched on this idea in *Florida Rock*, 791 F.2d at 900, because then Chief Judge Kozinski, deciding *Florida Rock* for the Claims Court, had raised the question. We thought, however, in the hypothetical event of a landowner leaking a septic fluid into the Miami drinking water, *Mugler* would be found very much alive as a precedent. The rule of *Mugler* is drastic indeed. Kansas had adopted by constitutional amendment—the first of its kind in the nation—strict prohibition of manufacture and sale of all alcoholic beverages. This rendered Mugler's brewery of no value and he contended it had been taken without just compensation. The 1887 Supreme Court held that state action under its "police power" to protect the "public health, the public morals, and the public safety," cannot be a taking. Moreover, the legislative judgment as to what measures were appropriate in exercise of that power was not for judicial review.

Now in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 107 S. Ct. 1232 (1987), the Supreme Court has dusted off

Mugler and put it back on its pedestal, while reducing *Pennsylvania Coal Co.* v. *Mahon* as a precedent pretty much to its own peculiar facts. Mugler commenced his business, so far as appeared, before any scheme of licensing existed that he might have arguably accepted as a condition. There was not in *Mugler* any attempt to justify the regulation by showing Mugler was not hurt so much as might appear. This has been a feature of modern regulatory taking cases, including *Keystone.* Nor had he any administrative remedy he had not exhausted. The dissent in *Keystone* agrees that a compensable taking does not necessarily occur when the government uses its authority to prevent a property owner from using his property so as to injure others, but argues that this, which it calls the "nuisance exception," does not apply to every case when the state uses its police power to curtail private rights.

A later case, also rehabilitated as precedential, is *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). We must, of course, transpose these statements from actions by states to those of the Federal Government. The state police power, as now described by the Supreme Court, no longer includes protection of "morals" but "welfare" is added. These changes do not concern us. The Federal Constitution exists, as stated in the preamble, for "the common de fence." There can be no doubt that President Carter considered nuclear proliferation was a threat to that defense, and that consequently the processing of spent fuel at the Barnwell plant was a danger he must avert. In *Radioptics, Inc.* v. *United States,* 621 F.2d 1113, 1127 (Ct. Cl. 1980), one of our predecessor courts stated that: "where the purpose of a regulation which causes interference with property rights is to prevent injury to the public welfare as opposed to merely bestowing upon the public a nonessential benefit, compensation under the fifth amendment is not required."

The Third Circuit holding in *Westinghouse Electric Corp.* would constitute a collateral estoppel on the parties to that

case, if one is needed, as to that issue. This provision in our view stands, with respect to the just compensation clause, the same as state action to protect public "health, morals, and safety" stood a century ago, or "health, safety, and welfare" today. One who proposes use of property injurious to common defense stands vis-a-vis the Federal Government the same as one whose use of property would be injurious to the interests the state protects under its police power.

III

If, however, despite its absence in *Mugler*, some antecedent acceptance of the regulatory scheme by appellants here is requisite if the government is not to be liable for a taking, such acceptance occurred. Appellants do not deny they accepted the regulatory scheme so far as it might have resulted in denial of construction or operating licenses on the ground the plant, as appellants would operate it, was unsafe. They deny that nuclear proliferation grounds were within the contemplation of the parties. However, the statute required the agency to take into account the common defense and security of the nation in passing on the licenses. We cannot believe that this did not include the unforeseen as well as the predictable. The attendant circumstances: the novelty of nuclear fission, the fearsome effect of its use in war, the public fears, all forbid us to suppose that the government had committed itself to use of its licensing power not to respond to some new ground of hesitation just because it was not originally foreseen.

Use of the licensing power is invalid if it is used to accomplish some object not within the purpose of that power, *Nollan* v. *California Coastal Commission*, 107 S. Ct. 3141 (1987), but the prevailing opinion in *Nollan* concedes that use for purposes within the object of the power reserved will be valid even if detrimental to the owner's full utilization of the property. *Id.* at 3146-47.

IV

Appellants have much to say about the "inducement" extended to them on the government's behalf to obtain the commitment of private capital that occurred. There was extended negotiation, with much "jawboning" on the government's part, with tender of technical assistance, and the government also furnished the land. This history of direct negotiation is unusual in regulatory taking cases, and we have not much guidance in the precedents to aid our deliberations.

We find the absence of a contract count in the complaint to be dispositive. One undoubtedly would be there if the existence of a contract right would be arguable, and one is present in the companion case, *NL Industries* v. *United States*, No. 87-1474, argued before the same panel the same day. Contract rights enforceable in the Claims Court include not only express contracts, but also contracts implied in fact. For example, in *Padbloc Co.* v. *United States*, 161 Ct. Cl. 369 (1963), the government was held to be liable to pay just compensation on an implied contract theory if it misappropriated and used intellectual property not amounting to a patent or copyright, and submitted under restrictive clauses for the purpose of making a sale. *Padbloc* is explained and limited in *Radioptics, Inc., supra.* Likewise, before enactment of the present 28 U.S.C. § 1498, consenting to suits against the government for patent infringements by it or committed on its behalf, the holder of a patent infringed by the government occasionally could sue on an implied contract theory if he could show he had offered the invention to the government expecting to be paid and the government used it, expecting to be called on to pay. *E.g., Berdan Fire-Arms Mfg. Co.* v. *United States*, 25 Ct. Cl. 355, 26 Ct. Cl. 48 (1890), *aff'd*, 156 U.S. 552 (1895). Arguably, the principle would apply if the government induced private capital to embark on a project, expecting for its part to be called on to cooperate

in making the project a success, or at least to do nothing harmful, and the contractor invested his capital, expecting it to be sheltered from adverse government action. We do not so decide, but in any event, the assertions about "inducement" in this case are not such as would support a good faith count pled along the line suggested. We think the hypothetical is the nearest to our actual case the law would go—if it went that far—in attaching significance to "inducement" by the government to private parties to invest their capital in a business enterprise. After all, when the government desires reluctant private capital to invest in risky enterprises, it is accustomed to make express contracts to "induce" by reducing or sharing the risk. The constitutional control of Congress over the public fisc is an adverse factor against liability for mere "jawboning" by government employees not authorized to commit it to legal liability. *NBH Land Co.* v. *United States,* 576 F.2d 317 (Ct. Cl. 1978). *See also Empresas Electronicas Walser, Inc.* v. *United States,* 223 Ct. Cl. 686 (1980).

Conclusion

The judgment of the Claims Court is reversed respecting the unripeness of the complaint and dismissing without prejudice. It is affirmed respecting its fifth amendment holding, and the cause is remanded with directions to dismiss the complaint with prejudice.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

In the United States Claims Court

146-83C

Filed: May 22, 1987

ALLIED-GENERAL NUCLEAR SERVICES, *ET AL.*, *Plaintiffs,* v. THE UNITED STATES, *Defendant.*	Taking; police powers; regulatory action; Atomic Energy Act; Administrative Procedure Act; due process; license; property interest; investment-backed expectations.

Bennett Boskey, Washington, D.C., for plaintiff. *Edwin E. Huddleson, III,* and *Volpe, Boskey and Lyons; H. Roderic Heard, Edward T. Butt, Jr., John E. Frey, Susan L. Walker, Steven E. Danekas, David S. Rees,* and *Wildman, Harrold, Allen & Dixon,* Chicago, Illinois; *Brian D. Forrow, Gerard P. Rooney,* and *Allied Chemical Nuclear Products Inc.,* Morristown, New Jersey; *James B. Hogan, Thomas J. Smith, David L. Ream,* and *Valley Pines Associates,* San Diego, California, of counsel.

Terrence S. Hartman, Washington, D.C, with whom was *Assistant Attorney General Richard K. Willard,* for defendant. *David M. Cohen, Director, Department of Justice, Solicitor E. Leo Slaggie, Richard S. Mallory* and *Irwin B. Rothschild,* Nuclear Regulatory Commission, and *Gregory Fess,* Department of Energy, of counsel.

OPINION

YANNELLO, Judge. This case was brought pursuant to the Tucker Act, 28 U.S.C. § 1491(a) (1), seeking compensation of $500 million for a taking by the United States. The matter is before the court on plaintiff's and defendant's motions for summary judgment.*

I. Factual Background

This court recognizes that each case in which a taking is alleged is unique. In most cases the uniqueness lies in the facts, and the development of those facts is important to the resolution of such case. Usually this factual development requires trial and the resolution of the case depends on factual findings. The situation in the instant case, however, is somewhat different.

Firstly, most of the basic facts in this case are stipulated and undisputed. (Even the facts about which there is any significant controversy have been stipulated for the purposes of the pending dispositive motions.)

Secondly, there are questions of law present in this case, and raised by the pending motions, which may well be dispositive of the entire matter. In any event, as the parties have recognized, even if the case were not resolved on the basis of these motions, a trial would be appropriate only after resolution of these legal issues since the scope of trial may be affected thereby. Accordingly, this court now undertakes a review of the pending dispositive motions.

The complex facts material to the pending motions have been most ably stated in the parties' briefs and are essentially agreed to. (In addition, these facts are recited in

* The suit was instituted by several corporate entities, who acted in concert in connection with the activities giving rise to this claim. Hence, reference herein is to a singular plaintiff.

Westinghouse Electric Corp. v. *United States*, 598 F.2d 759 (3d Cir. 1979), in which plaintiff in the instant case joined as a party plaintiff.)

No purpose would be served by reiterating these facts in detail here; a detailed Statement of Facts is set forth in the Appendix hereto.

The facts central to resolution of this case can be summarized briefly as follows, addressing first the general factual background and second, the facts concerning the "bargaining chip" issue raised extensively by the parties.

Prior to 1954, private corporations were unable to possess, produce, or use nuclear materials. In the years after 1954, the private commercial use of nuclear materials was encouraged, particularly in the generation of electrical power. As part of the cycle of nuclear-generated power, a waste product emerged known as "spent fuel." This spent fuel could be recycled or reprocessed so as to separate radioactive waste as well as plutonium. (Plutonium, unlike the enriched uranium used in the generation of electrical power, also has an application in nuclear weaponry.)

Changes in statutory provisions, such as the Atomic Energy Act (AEA) of 1954, 42 U.S.C. §§ 2011-2296, and the Private Ownership of Special Nuclear Materials Act (POSNMA) of 1964, 42 U.S.C. §§ 2012 *et seq.*, reflected these changes and contained the provisions pursuant to which private commercial enterprises could use nuclear fuel. The AEA, for example, provided for the granting of licenses to construct plants for the reprocessing of fuel and, after construction, to operate such plants. The AEA also provided that the issuance of such licenses should take into account whether the issuance "would be inimical to the common defense and security or the health and safety of the public".1 42 U.S.C. § 2236.

For the purposes of the pending motions, and based on the facts set forth in detail in the Appendix, it is concluded

that, prior to 1977, the government encouraged and exhorted private commercial enterprises to enter the field of nuclear generation of power and of reprocessing of spent nuclear fuel.

Plaintiff obtained a license to construct a reprocessing facility at Barnwell, South Carolina, and began construction in 1971. During the next several years, a number of events occurred, all of which led to the situation giving rise to this suit. In 1974, the government began preparation of a generic environmental statement referred to as GESMO. At about the same time, the government began proceedings on plaintiff's application for an operating license for its Barnwell plant.

Also at about this time, India conducted its first atomic test, using plutonium recovered from a spent-fuel reprocessing plant. In 1976 and 1977, the French and West German nuclear industries were negotiating to sell reprocessing technology to Brazil and Pakistan.

The international concerns about proliferation of nuclear technology, materials, testing, and weaponry had been the subject of non-proliferation treaties in 1968 and 1978. (*See* Appendix, footnote 12.) In 1976, President Ford discussed the risks of plutonium recycling and declared that the country "should pursue reprocessing and recycling in the future only if they are found to be consistent with our international objectives". (*See* Appendix, footnote 7.)

In April 1977, President Carter noted with alarm the serious proliferation risks of plutonium recycling and announced the sponsorship of an International Nuclear Fuel Cycle Evaluation (INFCE) program. The government's immediate response was to defer indefinitely the commercial reprocessing and recycling of plutonium from spent fuel used in the generation of power.

The agency immediately announced a postponement of the GESMO hearings and a reassessment of the applica-

tions for licenses relating to recycling. The agency requested comments and received comments on behalf of the President, re-emphasizing his earlier statements. In December 1977, the agency announced the termination of all GESMO proceedings as well as most proceedings relating to license applications for plutonium recycling. The agency would reexamine the matter after the conclusion of investigations into alternative fuel cycles, which was expected in about two years. (This directive was memorialized in 1978.)

Parties interested in such license proceedings, including plaintiff, filed suit to protest the cessation of proceedings. The agency action was upheld, however, and the court, in *Westinghouse,* 598 F.2d 759, stated that the agency-imposed "moratorium" was appropriate when sound regulatory reasons existed for doing so, as where the moratorium was designed to enable the agency to make rules and regulations which would be applied in the context of processing licensing applications. The court found that the agency did not abuse its discretion or act arbitrarily or capriciously "when it rested its decision in part on a desire not to obstruct the goal of securing international nonproliferation." *Westinghouse,* 598 F.2d at 776.

The court provided that the agency may not completely terminate the license application proceedings, simply by declaring an open-ended moratorium, without passing on the merits of the applications and that the agency must grant licenses unless it makes a finding of inimicality to the common defense and security or to the public health and safety. *Westinghouse,* 598 F.2d at 774.

The court concluded that:

> When and if it ever becomes apparent that the [agency] has de facto denied the license applications despite the applicants' compliance with the pertinent regulations and without making a finding of inimicality, or that the moratorium is

> of unreasonable duration, judicial recourse will be available to the aggrieved parties.

Id.

The final INFCE hearings were concluded and a report was issued in March 1980. Also at that time a study was issued concerning an interagency Non-proliferation Alternative System Assessment Program (NASAP). Statements on behalf of the President continued, at that time, to recommend that the GESMO proceedings should remain terminated and that a reopening would be inimical to national security and the non-proliferation foreign policy interests of the United States. Then in 1981, President Reagan stated:

> I am lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States. In addition, we will pursue consistent, long-term policies concerning reprocessing of spent fuel from nuclear power reactors and eliminate regulatory impediments to commercial interest in this technology, while ensuring adequate safeguards.

(*See* Appendix, pp. viii and ix.)

Notwithstanding this statement, the agency has not reopened GESMO proceedings or licensing proceedings.

For purposes of the pending motions, and based on the facts set forth in detail in the Appendix, it is concluded that the government's refusal to consider plaintiff's application to operate its Barnwell facility, and the agency's continuation of its indefinite moratorium on such consideration, is based on concerns of international proliferation. It is also concluded that the agency has forsaken domestic commercial reprocessing of spent nuclear fuel as a "bargaining chip" in an effort to further international agreement on non-proliferation.

II. Issues Presented

The parties' briefs address the essential elements of a taking claim, namely, whether there is a property interest here which can be the subject of a taking and whether there has in fact been a taking of that property interest by virtue of the government's actions.[1]

Plaintiff contends that the government's refusal to consider its application for an operating permit constitutes a taking of its license, its plant, or both, requiring just compensation. Plaintiff also contends that even if its property has not been taken for a "public use" by the government, the government regulation and restrictions on the use of the plant constitutes a taking "for a public purpose", and requires just compensation.

With respect to an operating license, defendant contends that the issuance of a license which is subject to certain conditions and administrative considerations, is not a "property right" which can be the subject of a taking, requiring compensation. Moreover, with respect to plaintiff's plant, defendant argues that it has not been taken but remains plaintiff's property, free to be used in any legal manner (absent use as a licensed nuclear reprocessing plant).

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[1] One of the other critical elements in determining if a taking has occurred is whether, in fact, the property owner has been deprived of economically viable uses of the property. Evaluation of this factor is based not on a mere diminution of value nor on a denial of the highest and best use of the property, but on the value of the remaining uses to which the property may be put. *See, e.g., Deltona Corp.* v. *United States,* 228 Ct. Cl. 476, 657 F.2d 1184 (1981), *cert. denied,* 455 U.S. 1017 (1982).

In the instant case we need not now address that issue. That matter is not properly the subject of the pending motions, and the parties have not stipulated to any values of the property, either before the alleged taking or after. Rather, here, the threshold question is whether there has been, as a matter of law, a taking claim stated based on the facts as set forth in the text above.

Much of the briefing by both parties centered around these issues of regulatory taking.[2]

III. Opinion

In 1977, hearings on and consideration of plaintiff's application for an operating license ceased without reaching a decision. Much of what plaintiff complains of in this case centers around that cessation and the actions of the agency and of the Administration generally, including the President and other officials, which led to it. The plaintiff argues that that cessation—and its continuation even to this time—is contrary to the governing statute, the AEA, and constitutes a taking of its property.

However, the 1977 cessation—at least a cessation for some period of time—has been upheld by the court which is statutorily charged with the jurisdiction and responsibility for rendering such determinations, in an action in which both parties here participated. *See Westinghouse, supra,* wherein the court upheld a moratorium designed to enable the agency to promulgate reasonable rules and regulations.

Moreover, the court further stated that, if it became apparent that the agency de facto denied an application without making the required findings of inimicality to public safety or defense or that the moratorium continued for an unreasonable duration, judicial recourse would be available.

A similar situation was presented in *Deltona Corp.* v. *United States,* 228 Ct. Cl. 476, 485, 657 F.2d 1184 (1981),

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[2] In considering the parties' briefs, prior to oral argument, the court noted that the contentions of the parties might be restated so as to embrace other causes of action, some perhaps raising jurisdictional issues. At the outset of oral argument, the court voiced these concerns, which the parties were given an opportunity to address then and in post-argument supplemental briefing.

where the denial of a permit was upheld as valid in a suit under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976) in United States District Court before a claim for taking was presented to the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

In *Deltona,* plaintiff did not take issue with this finding in the Court of Claims. In the instant case, plaintiff apparently seeks to contest the finding of the validity of the 1977 cessation of hearings in this court by alleging that the cessation, and the reasons therefor, were improper. Moreover, plaintiff argues that the continued cessation over several years—which the *Westinghouse* decision did not address for the obvious reason that such continuation had not then occurred—is improper.

However, as noted in the text above, and in the accompanying Appendix, Congress, in the governing statute, the AEA, vested in administrative tribunals and in other federal courts, but not in this court, the jurisdiction to review, in the first instance, the validity and propriety of the agency regulatory action. Where such jurisdiction is expressly placed elsewhere, this court cannot, under the guise of hearing a fifth amendment taking claim, assume such jurisdiction to determine the validity of agency regulatory action, or to reverse the findings of validity made by those tribunals statutorily charged with that responsibility. *See also, e.g., Shanbaum* v. *United States,* 1 Cl. Ct. 177 (1982) *aff'd* 723 F.2d 69 (Fed. Cir. 1983).[3]

This circumstance, in the instant case, is not unlike that in *Ruckelshaus* v. *Monsanto Co.,* 104 S. Ct. 2862 (1984), where the regulatory taking was alleged to have arisen in

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[3] Because Congress, in the AEA, expressly places jurisdiction to review the regulatory action elsewhere than this court, we need not consider other general areas in which a Tucker Act suit would be appropriate. *Cf. South Puerto Rico Sugar Co. Trading Corp.* v. *United States,* 167 Ct. Cl. 236, 334 F.2d 622 (1964), *cert. denied,* 379 U.S. 964. (1964).

connection with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136a and 136h. There, the Court recognized that a taking might occur if the agency were to engage in action which would be unlawful within the statutory framework (such as if it were to release data submitted between 1972 and 1978 when confidentiality had been statutorily assured). The Court further found that if such a taking did occur, the proper recourse was a suit under the Tucker Act, which could not be repealed by implication in FIFRA. However, the Court also noted that FIFRA put in place an arbitration remedy designed to determine the amount of just compensation, which must be exhausted as a pre-condition to bringing a Tucker Act claim.[4] Until that avenue had been exhausted, no Tucker Act claim could be advanced.

A somewhat similar result was reached in *United States* v. *Florida Rock Industries,* 791 F.2d 893 (Fed. Cir. 1986), wherein the decision of the lower court was affirmed in part and vacated in part. At issue was a taking claim resulting from regulatory action in which a permit to mine limestone was denied. The denial was based on the agency's finding that there was at least some *de jure* pollution by plaintiff's project. The lower court reviewed this determination and found that no pollution would result, and the Court of Appeals determined that to be error, concluding that:

> . . . [T]he alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all respects.

Florida Rock 791 F.2d at 905.

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[4] The Court also noted that, while such statutory remedies must be exhausted, the action in this court under the Tucker Act would proceed essentially *de novo* in determining the amount of just compensation due plaintiff, without the requirement that either party dispute the correctness of the amount determined by the arbitration.

The court further stated:

> . . . [W]e think it is indisputable that the proper way to challenge the decision to grant or withhold the permit would be under the Administrative Procedures Act (APA), 5 U.S.C. § 702 and ff.

Florida Rock at 898.

Similarly, the court noted that an agency refusal to consider applications for permits would be reviewable under the APA and not under the Tucker Act. *Id.* at 899.

Thus, in the instant case, if it is believed that the agency's refusal to recommence consideration of the plaintiff's application for an operating license is invalid or improper, or that such refusal amounts to an invalid de facto denial of the license, the proper place to assert such challenge is through the channels prescribed in the AEA, and not in this court. Pursuit of such redress may presumably lead to two alternative results: the agency's continued moratorium may be upheld or it may be found to have been invalid and an invalid de facto denial of the application; if the agency is required to resume consideration of plaintiff's application, the application may or may not be denied.[5]

This court, lacking the jurisdiction to determine, in the first instance, the validity of the agency regulatory action under the AEA and noting the absence of any finding of

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[5] If a de facto denial, or a denial after resumed consideration of the application, were to be reversed by the agency, or upon administrative or judicial review of the agency regulatory action, the plaintiff may have been temporarily deprived of the use of its property but, as the Court noted in *United States* v. *Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, n. 6 (1985), it has not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings". In any event, we do not have such a situation present in this case at this time.

invalidity by the appropriate tribunals, assumes, as did the Federal Circuit Court of Appeals in *Florida Rock*, that the election of a Tucker Act suit concedes the authority of the agency to take the regulatory action (including the prolonged moratorium of hearings) now in issue. This assumption is made notwithstanding the vehemence of plaintiff's contentions that they agency action is wholly improper, invalid, and unwarranted, since such contentions are believed to be better addressed to some other tribunal under the AEA. Indeed, in a supplemental brief filed May 29, 1986, plaintiff acknowledges that the validity of the agency's 1977 action has been upheld in *Westinghouse*, and further acknowledges that it will accept that decision without "further APA-review proceedings" so as to proceed directly in this court on a Tucker Act taking claim.

The next issue then presented to this court is whether the presumably correct agency regulatory action constitutes a taking. Under the circumstances here present, this court concludes that it does not.[6]

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[6] This court also notes that the agency moratorium on hearings in 1977 has been upheld, that plaintiff has not requested, pursuant to the AEA, a resumption of hearings, or the license itself. Thus the claim now presented may well be premature. *See, Riverside Bayview*, 106 S.Ct at 460.

Plaintiff, of course, contends that the 1977 cessation of the GESMO and related hearings has itself totally and permanently deprived it of its property rights. In any event, we need not encourage needless future litigation of any ripened claim since the court concludes that in no event would plaintiff's property be subject to a taking by proper regulatory action.

Moreover, as noted in footnote 1 above, the parties disagree as to the remaining uses to which the property might be put (as well as any economic valuations). Plaintiff also contends that its application has been effectively denied since there is no longer any possibility of using the facility for its intended purpose. Notwithstanding these controversies, the court believes that, as a matter of law, the regulatory action here cannot constitute a taking requiring just compensation.

This court does not in any way refute the now well-established doctrine that government regulation, even if for a valid public interest but without actual public use of the owner's property, can constitute a taking. The Court of Claims restated this doctrine in *Deltona*, where it also found that no taking occurred because plaintiff had not been deprived of economically viable uses of its lands (a matter not in issue at this time in the instant case). Rather, this court's conclusion is based on an analysis of the differing circumstances present in the instant case from those in which such a taking has been found.

In an early decision in *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967), the denial of a license by the Maritime Commission was found not to constitute a taking compensable under the Constitution. The court stated as follows:

> The Commission's role was simply part of a pre-existing regulatory process known to the plaintiff from the time it purchased the *Eastport* and the Commission's failure to give its approval within the necessary time took no property from plaintiff any more than a comparable failure by the Federal Trade Commission, the Securities and Exchange Commission, or the Federal Power Commission, in their administrative process, would amount to a taking.

Id. at 612, 372 F.2d at 1011.

The Court of Claims noted particularly that the regulatory process was "pre-existing" and was "known to plaintiff".

On the other hand, the Federal Circuit Court of Appeals in *Florida Rock, supra*, opined that the record revealed a strong possibility that a taking occurred, if the proper legal standards were employed in making such determination, while also noting that the regulatory action in issue resulted from amendments of the process which "followed

the acquisition [of the statutory property] and, according to the trial judge, *Florida Rock* need not have foreseen them." *Florida Rock*, 791 F.2d at 895.[7]

This focus on foreseeability was upheld at length by the Supreme Court in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984), where the Court noted the difficulty in determining when a regulatory taking has occurred:

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[7] In yet another case, a combination of the factors present in both *Eastport* and *Florida Rock* was present.

In *Deltona*, where no taking was found because economically viable uses still remained, the court noted that the property interests were generated pursuant to a limited existing regulatory framework, which framework was then considerably expanded; the court also stated, however, that:

" . . . when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from [the agency]. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation." *Id.* at 491.

This discussion was, of course, directed to plaintiff's assertion that the mere deprivation of its expected highest and best use of its land, holding that such contention does not satisfy the requirements for a taking.

In the instant case, the regulatory framework of the AEA was in place when plaintiff acquired or generated the property interest which it alleges has now been taken. Moreover, like *Eastport*, and unlike *Deltona*, the standards and conditions requisite to obtaining a permit did not change; they remained throughout the public health and safety and common defense and security. Plaintiff's contention that administrative concentration on international proliferation and bargaining chips changed the standards anticipated under the existing regulatory framework, is belied by the *Westinghouse* decision upholding these considerations in imposing the 1977 moratorium and, indeed, by the presumption, in this taking case, that the regulatory action was proper. *See* also the discussion in the text above concerning proper tribunals to contest such regulatory regularity.

> As has been admitted on numerous occasions, "this Court has generally 'been unable to develop any "set formula" to determine when "justice and fairness" require that "economic injuries caused by public action' " must be deemed a compensable taking [compensated by the government, rather than remaining disproportionately concentrated on a few persons.] The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. The Court has, however, identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking". Among these factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." [Citations omitted.]

The Court focussed on the criterion of the reasonableness of the investment-backed expectation. *See, also, Whitney Benefits, Inc.* v. *United States,* 752 F.2d 1554, 1558 (Fed. Cir. 1985); *Connolly* v. *Pension Benefit Guaranty Corp.,* 106 S.Ct. 1018 (1986).

In *Monsanto,* the owner had generated health, safety, and environmental data concerning its pesticide products which it was required to submit to the government in order to obtain a registration to market the products. (*See* FIFRA, *supra.*) The Court held that such data were property rights, the taking of which might require just compensation.

The *Monsanto* opinion addressed the statutory scheme (1) from its inception in 1947, (2) through treatments accorded through 1972, (3) from 1972 to 1978, and (4) the amendments after 1978. The statutory scheme in effect from 1972 to 1978 gave the submitter of the data an opportunity to designate "trade secrets" with the explicit

assurance that the agency was prohibited from disclosing publicly (or considering in connection with the application of another applicant), any data which constituted "trade secrets". The Court found that this assurance formed the basis of a reasonable investment-backed expectation in the data. Such reasonable expectations would be frustrated by any agency disclosure not authorized by the statute then in effect (from 1972 to 1978 with respect to data submitted during that period), and a compensable taking might result.

With respect to the amendments effective in 1978, the Court held that:

> . . . Monsanto could not have had a reasonable, investment-backed expectation that [the agency] would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which [the agency] was authorized to use and disclose any data turned over to it by an applicant for registration.
>
> * * * * *
>
> If, despite the data-consideration and data-disclosure provisions of the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when [the agency] acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Monsanto, 467 U.S. at 1006-1007.

The Court, in *Monsanto, supra,* concluded:

> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legiti-

> mate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

Id. at 1007.[8] Thus, the foreseeability of the existing statutory limitations played a key role in the Court's decision.

In sum, in *Eastport,* the Court of Claims found that property interests which were generated pursuant to an existing and foreseeable regulatory framework were not, and could not be, taken by virtue of the operation of that framework. In *Monsanto,* the Supreme Court found that property interests which were generated pursuant to an existing and foreseeable regulatory framework permitting disclosure were not, or could not, be taken by virtue of the operation of that framework or disclosure. Conversely, the Court in *Monsanto* also found that property interests which were generated pursuant to an existing regulatory framework which did not envision disclosure, could be taken by operation of the unforeseeable regulatory action of disclosure.

Plaintiff would apparently concede in this taking case, that the exercise of regulatory action was valid under the AEA. But, at the same time, it argues that the action involved the imposition of standards, such as changes in the state of the art and proliferation of technology, which were not foreseeable under the AEA. These contentions would appear to be inconsistent.

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[8] Monsanto also argued that the statute's very requirement of data submission as a precondition to marketability was a violation of its constitutional rights. The Court, in summarily dismissing this contention, noted that:

"[S]uch restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' [Citations omitted.] This is particularly true in an area, such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation." *Id.* at 1007.

If the agency's action utilizes standards not contemplated within the AEA, then the action should be challenged, elsewhere, as invalid. If the agency's action is valid, and employs standards consonant with the AEA's proscription of public health and welfare and common defense and security, then the standards were foreseeable.

In addition to considering the issues of foreseeability, the identification of regulatory action as a taking involves a "weighing of private and public interests". *Agins* v. *City of Tiburon*, 447 U.S. 255, 261 (1980). With that, as the Court stated in *Monsanto, supra*, one must consider whether the regulatory action is such that the private property owner should bear the burden or whether the public interest and benefit warrant a sharing of that burden by the public fisc. In *Florida Rock, supra*, wherein the court found that, under properly applied legal principles a taking may well have occurred, the court stated:

> This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return.

Florida Rock, 791 F.2d at 904. (In that case, of course, the matter of determining the exact valuations of the property are to be the subject of remand to the lower court.) But here, again, it must be noted that the lower court found that the changes in the regulatory scheme need not be foreseen by the property owner (and the appellate court apparently accepted such finding).

In the instant case, we have a situation where a plaintiff developed property, at considerable expense, so as to par-

take of a nuclear fuel industry with the expectation (backed by investments) that it will lead to a most profitable undertaking over many years to come. So also acted the diet-food industry in using, first, cyclamates, then saccharin, and currently aspartame. Both industries generated this property pursuant to existing statutes which provided that continued licensing would be subject to the public interest including, *inter alia,* public safety considerations. As the industries might flourish, considerable returns on the investment might be expected. Any change in the state of the art or technology, however, such as findings of carcinogenicity of some of the artificial sweeteners, might bring with it recalls of products and financial losses.

On balance, the circumstances present here are such that the plaintiff, albeit at apparently considerable expense, entered into an enterprise which, by virtue of new developments, reaped not the expected financial success but rather considerable loss. Just as the private venture would reap the rewards of success, so must it bear the burden of loss. The regulatory action here, presumed to be valid, cannot be said to have involved considerations so unforeseeable that the public, rather than the plaintiff, should bear the burden of the loss.[9]

Based on the standards so far enunciated by the higher courts, and based on the apparent circumstances present in the instant case as compared with those giving rise to such higher court decisions, it is concluded that the prop-

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[9] Again, as noted in footnote 5, a different situation of operating licenses were to be found unwarranted, either administratively or through appropriate recourse to the judiciary, and a license subsequently issued. The question of a temporary taking is as yet unresolved. (Any such issue might also occasion the raising of a defense of laches, involving unreasonable delay and possible prejudice to defendant, by virtue of the time elapsed in obtaining the reversal.) As yet, no such reversal has been obtained, nor has plaintiff fully pursued possible AEA review so as to seek such reversal.

erty interest generated here cannot be said to be subject to a possible taking.

Nothing in the *Riverside Bayview* decision contradicts the decision reached in this case. Indeed, it appears that the issue was neither raised nor considered in *Riverside.*[10]

There has been no case cited to this court in which a property interest, which was acquired and developed subsequent to and subject to a promulgated and existing regulatory scheme, has been found to have been "taken" by the operation and lawful implementation of that regulatory scheme so as to require compensation under the Constitution.

Another significant issue arises in this case. It has been noted that the plaintiff's application for the requisite license has not yet been denied by the agency.

Since the issuance of the INFCE report in 1980, no further proceedings have been commenced by the agency nor have they been requested by plaintiff. Likewise, plaintiff has not sought to use the appeals process contained in the AEA to compel consideration of its application as suggested by the court of appeals in the earlier *Westinghouse* decision.

Thus, the *Riverside* opinion would reinforce this court's decision that a taking claim can lie here, if at all, only after the administrative regulatory process has been enforced, has been concluded, and results in a denial (and a

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[10] Unlike the instant case where constant regulatory jurisdiction and statutory factors have been maintained, it appears that the *Riverside* case involved an expansive change in the agency's regulations interpreting its jurisdiction, rendering it more similar to the *Deltona* case than to *Eastport,* both of which are discussed in the opinion above. In any event, the issue of foreseeability, and the concomitant question of whether the property interest was generated within the foreseeable regulatory framework, was not addressed in the *Riverside* decision.

denial subsequently found to be wrongful and/or reversed) of the license plaintiff seeks. (*See, also* footnote 8 above.)

Moreover, in *MacDonald, Sommer & Frates, et al.* v. *Yolo County,* 106 S.Ct. 2561 (1986), the Supreme Court commented on incomplete regulatory action, stating:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

MacDonald, 106 S.Ct. at 2567.

The court stated further:

> Most recently, in *Williamson Planning Comm'n.* v. *Hamilton Bank,* we held that the developer's failure either to seek variances that would have allowed it to develop the property in accordance with its proposed plat, or to avail itself of an available and facially adequate state procedure by which it might obtain "just compensation," meant that its regulatory taking claim was premature.

Id.

In the instant case, plaintiff has failed to use the available statutory provisions for review of agency action to ensure agency consideration of its pending application. Plaintiff would argue that this court should "deem" the long delay in resuming agency proceedings as a "constructive denial" of its application and proceed from that denial to determine whether a taking has occurred.

The events leading to the *Eastport* decision, *supra,* would seem to militate against such an approach. The wrongful delay in administrative consideration would be more akin to wrongful action than to providing the basis for a "constructive denial" and hence a taking claim.

We grant that in particular instances an administrative failure to issue a decision is likened to a denial of the

claim. (*See, e.g.,* the Contract Disputes Act of 1978, 41 U.S.C. § 605(c) (5); even there the appellate tribunal has the discretion to stay proceedings to obtain the absent decision.) In most instances, however, this doctrine is used as a basis for an appeal on the merits of the claim being "deemed" as denied. (As if, for instance, plaintiff sought to appeal a "denial" of its application under the AEA (or APA).)

Absent any existing authority supporting plaintiff's argument, and mindful of the *MacDonald* decision, this court declines to employ this approach. It will not "deem" the agency to have denied the application on the merits and then determine whether a taking has occurred on the basis of such denial.

Like the Court in *Williamson* and *MacDonald,* this court would not require plaintiff to appeal the merits of any actual denial of its application (or to exhaust all administrative remedies), but it does require that plaintiff receive a final determination from the agency on plaintiff's application—an action which has not yet been taken.

As the Court indicated, in *MacDonald,* the issue of prematurity may be said to go to the jurisdiction of the courts. *McDonald,* 106 S. Ct. at 2567.[11]

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[11] The courts are charged with the fundamental duty of determining the existence and extent of their jurisdiction. In the instant case, the question of the prematurity of plaintiff's complaint is not the only possibly troublesome jurisdictional issue; more basic issues may exist as well.

This case involves alleged violations of the protections of the Fifth Amendment to the Constitution—namely, protection against a governmental taking without payment of just compensation.

Until the mid-1800's, redress of a violation of the Fifth Amendment was available in two ways: (1) a suit would lie in Article III district courts to prevent, or "undo", any taking not accompanied by just compensation; and (2), a petition could be brought to Congress (*e.g.,* for a private relief bill) to obtain the just compensation due. With the

CONCLUSION

Based on the foregoing, it is concluded that the plaintiff's claim is premature and that therefore this court lacks jurisdiction thereof.

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enactment of the Tucker Act (28 U.S.C. § 1491(a)(1)), sovereign immunity was waived and a suit could be brought for the monetary amount of just compensation.

For many years, discussion ensued as to the type of forum upon which such jurisdiction for money damages, could properly be conferred. The Supreme Court, in *Glidden* v. *Zdanok*, 370 U.S. 530, at 543, 549 (and footnote 21), noted suggestions that such jurisdiction must rest in judicial (Article III) courts rather than legislative (Article I) courts. In that decision, the Court also determined that the Court of Claims, then the repository of the Tucker Act jurisdiction over taking claims, was an Article III court. (*See also* general discussions in *Palmore* v. *United States*, 411 U.S. 389 (1973) and *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The Federal Courts Improvement Act of 1982 (Pub. L. 97-164), or FCIA, amended the Tucker Act (28 U.S.C. § 1491(a) (1)) so as to confer jurisdiction for award of money damages for such taking claims in this court. The FCIA also provided that the Claims Court was established under Article I, and its judges serve limited fixed terms. As a waiver of sovereign immunity against suit for money damages, such conferral of jurisdiction is not objectionable. However, given its broader implications, the conferral of jurisdiction may be questionable.

The FCIA did not confer any concurrent jurisdiction in the Article III district courts for the award of money damages. *See, e.g.*, 28 U.S.C. § 1346(a) (1) with respect concurrent Tucker Act jurisdiction over tax-refund cases. (While the decisions of the Claims Court are subject to appeal in the Article III Court of Appeals for the Federal Circuit, the lower court's findings of fact are, under current practice, presumed correct unless shown to be clearly erroneous.) Thus, there is no *de novo* consideration by an Article III court of suits for just compensation.

Moreover, given the provisions of the current Tucker Act, the district courts may not be permitted to prevent or "undo" takings not accompanied by adequate just compensation. *See, e.g., Riverside Bayview*, 106 S. Ct. at 460 (and footnote 6). Rather, the exclusive avenue of relief may be under the Tucker Act and hence in this court.

In any event, with respect to "regulatory takings" involving statutes

Accordingly, the defendant's motion for summary judgment is GRANTED, and the petition is to be dismissed without prejudice.[12]

Alternatively, in the event that it were to be found that the claim were not premature and/or that this court did

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designed to protect the public safety and welfare, it may be more desirable to provide for a monetary remedy to the claimant than to attempt to prevent or "undo" execution of the regulatory action. (*See, e.g.,* the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136m; *see also Ruckelshaus* v. *Monsanto Co.,* 104 S. Ct. 2862 (1984) and footnote 4 above.)

Thus, with the FCIA's amendment of the Tucker Act, and its creation of the Claims Court, an Article I court may now, apparently, be the sole arbiter (particularly in the resolution of factual issues) of citizens' rights under the Constitution's Fifth Amendment.

Mindful of our responsibility to determine jurisdiction, but also mindful of the axiom that constitutional challenges to statutes (such as the FCIA which unquestionably confers jurisdiction here) are to be avoided unless absolutely necessary, and as a last resort, this court takes an unusual, but not unprecedented, step. Having determined to dismiss the case on other grounds, this court will not address further the basic issues of jurisdiction outlined in this footnote. *See, e.g., Travis* v. *United States,* 199 Ct. Cl. 67, at 70 (footnote 1) (1972).

[12] During oral arguments, the court suggested that plaintiff may desire to suspend further proceedings here, seek further agency determination on its application, and then supplement its petition to include any new results. (The court indicated that it would nonetheless certify its interlocutory decision for appeal purposes.)

In this way, both its original cause of action and any claim based on the more recent action would remain before the court—eliminating any possible statute of limitations defenses which might possibly otherwise arise. (While the court could not predict that any such defenses would exist, discourses in some professional journals suggest that the issue is not without controversy.)

Plaintiff, however, requested that the court not take this action but, if dismissal is indicated, the case be dismissed outright. This would eliminate any discretion in an appeal from this court's decision. Accordingly, in dismissing this action the court accedes to plaintiff's request.

have jurisdiction, then, based on the foregoing, it is concluded that plaintiff's complaint does not set forth a claim for compensable taking for which this court can grant relief inasmuch as the property allegedly taken was generated under the existing regulatory system. (In this event, the defendant's motion would likewise be granted, but the complaint would be dismissed with prejudice. *See, e.g.*, RUSCC 41(b) with regard to motions to dismiss for failure to state a claim based on evidence, or facts, as presented by plaintiff only.)

Costs to the prevailing party.

/s/ JUDITH ANN YANNELLO
JUDITH ANN YANNELLO, Judge

APPENDIX

Statement of Facts

The first statutory enactment cited by the parties, treating the possession or use of nuclear technology or materials by private entities, is the Atomic Energy Act of 1946.[1] Before that time, presumably, there was no statutory regulation and with the passage of that Act such possession or use was severely limited or proscribed.

Shortly thereafter, the Atomic Energy Act of 1954 (the "AEA") was enacted and it is with that statute that this case is now concerned.[2] The AEA altered the policy of the previous statute, and permitted private possession and use of nuclear technology and materials subject to certain regulatory schemes, including the requirement for licensing. (See also the subsequent Private Ownership of Special Nuclear Materials Act of 1964 ("POSNMA").[3]) Also relevant is the National Environmental Policy Act of 1970 ("NEPA").[4]

As provided in the AEA (and the subsequent POSNMA), and to the extent consistent with the NEPA, nuclear materials could be possessed by private entities. Indeed, under the AEA, related government agencies (now the NRC) encouraged the private commercial use of nuclear processes in the generation of electrical power sources and this

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[1] Atomic Energy Act of 1946, 60 Stat. 755 (superseded in 1954).

[2] Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§ 2011-2296 (1976 and Supp. V. 1981).

[3] Private Ownership of Special Nuclear Materials Act of 1964, 78 Stat. 602, codified at 42 U.S.C. § 2012 *et seq.*

[4] The National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (eff. Jan. 1, 1970) 42 U.S.C. § 4321, *et seq.*

policy was pursued during the course of at least the next two decades.[5]

An understanding of the facts material to the instant motions requires a slight digression into the field of nuclear-generated electric power and the nuclear fuel cycle.

The nuclear reactors used by electric utilities primarily use enriched uranium dioxide as fuel, and, during the nuclear chain reaction some of this uranium is transmuted into plutonium. When no longer of use to the utility, the fuel is defined as "spent" and is removed from the reactor; the spent fuel contains uranium, plutonium, and waste.

Disposal of this spent fuel may present problems including those incident to the storage of radioactive elements. Accordingly, private commercial enterprises might be further encouraged to use nuclear processes for generating power if the disposal of spent fuel were assumed by the government.

Reprocessing (or "recycling") the spent nuclear fuel, a process sometimes referred to as the "back end" of the fuel treatment, is an alternative to disposal.

Recycling of spent fuel could result in fabrication of new mixed oxide nuclear fuel (by separating the uranium, the plutonium, and the waste) which could in turn constitute a significant new source of energy and conserve the world's uranium supply. One difficulty with such reprocessing, however, is that it results in separation of plutonium from the spent fuel. Plutonium, unlike the enriched uranium, has application not only for nuclear electric power but also nuclear weaponry.

As noted above, the AEA of 1954 and POSNMA of 1964, enabled private concerns to possess and use nuclear

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[5] Passing reference is also made by the parties to another statute, one enacted after the events here in issue, namely the Nuclear Waste Policy Act of 1982, Pub. L. 97-425, 96 Stat. 2202 (eff. Jan. 7, 1983), 42 U.S.C. § 10101 *et seq.* ("NWPA").

fuel in generating power. Possession for the purpose of recycling was also permitted. The government began encouraging research and development in this field in the late 1950's and continued this activity through the mid-1970's.[6]

The AEA required that a construction permit be obtained before building began to assure compliance with various procedures not here in issue. After completion of construction, a further license was required permitting operation of the plant and actual fuel reprocessing.

The AEA provided, at 42 U.S.C. § 2133(d), 2134(d), that the government was precluded from issuing a license if such issuance "would be inimical to the common defense and security or the health and safety of the public." A license once granted could be revoked for the same reasons. 42 U.S.C. § 2236(a).

Applications for permits and licenses are made to the Atomic Safety and Licensing Board. (In connection with operating licenses, hearings are held only in contested cases and with respect to matters in controversy.) The decision of the Board is appealable to an Atomic Safety and Licensing Appeal Board, and thereafter is subject to discretionary review by the agency itself. Final orders are directly appealable to the courts of appeals. 42 U.S.C. § 2239(b); 28 U.S.C. § 2343; 10 C.F.R. §§ 2.714, 2.721, 2.786, 2.787.

Plaintiff purchased land at Barnwell, South Carolina, with the intention of constructing a reprocessing plant and applied for a construction permit in 1968. Plaintiff retains title to and use of the land herein involved. In December 1970, when the AEA and NEPA were in effect, plaintiff was granted a construction permit. It began constructing

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[6] *Westinghouse Electric Corp.* v. *United States*, 598 F.2d 759, 762 n.4 (3d Cir. 1979) (a reprocessing plant was built by Nuclear Fuel Services, Inc. in 1960 and operated by it from 1966 to 1971).

a building facility for the purpose of reprocessing spent nuclear fuel in 1971. The building was completed and plaintiff applied for the operating permit. (In the construction phase, plaintiff incurred a multi-million dollar expense.)

It was in connection with this licensing (for operation) procedure that the controversy arose giving rise to this suit.

Plaintiff contends that the government, notwithstanding and in spite of its early encouragement of the entry of private concerns into the nuclear fuel process and reprocessing, wrongfully abandoned its licensing consideration in 1977 thereby resulting in a taking of plaintiff's property. The focus of the complaint is the government's action (or lack thereof) in 1977 and the processes leading up to it.

The government recognized that the NEPA required the preparation of an environmental impact statement (EIS) concerning any decision to implement a wide-scale program for commercial recycling of spent fuel containing plutonium. In 1974, the government began preparation of such a statement, a Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors, referred to as "GESMO".

Concomitant with the GESMO proceedings, the government conducted adjudicatory licensing proceedings on applications by private companies dealing with the construction and operation of recycling plants, including the application for operation of the nearly-completed plant submitted by AGNS.

The agency's first draft of GESMO, in mid-1974, prompted a response from the President's Council on Environmental Quality, noting the failure of the draft to address such concerns as the danger of proliferation and

possible safeguards.[7] The agency then promulgated, in November 1975, a policy stating that proliferation risks and safeguards would be included in GESMO, and promulgated procedures for hearings.

The 1975 statement also provided that the agency would consider interim licensing of non-experimental, recycle-related activities. Various environmental groups challenged this procedure and the Court of Appeals for the Second Circuit, in 1976, affirmed the agency's hearing procedures but held that the interim licensing of recycle-related activities on a commercial basis violated NEPA. In view of agency statements in 1977, the Supreme Court vacated and remanded the matter for consideration of mootness. *National Resources Defense Council (NRDC)* v. *United States Nuclear Regulatory Commission (NRC)*, 539 F.2d 824 (2d Cir. 1976), vacated and remanded *sub nom Allied General Nuclear Services* v. *NRDC*, 434 U.S. 1030 (1978).

In April 1977, President Carter disclosed his Administration's policy, noting with alarm the serious proliferation risks of plutonium recycling. The government's response would be to defer indefinitely the commercial reprocessing and recycling of plutonium produced in United States nuclear power programs. The President also announced sponsorship of an International Nuclear Fuel Cycle Evaluation (INFCE) program aimed at developing alternative processes.

Almost immediately, the agency postponed further GESMO hearings and, on May 3, 1977, announced its intention to reassess "the future course and scope of

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[7] In October 1976, President Ford discussed the risks entailed in plutonium recycling and declared that the nation "should pursue reprocessing and recycling in the future only if they are found to be consistent with our international objectives." Statement by the President on Nuclear Power Policy, reprinted in 12 Weekly Comp. of Pres. Doc. 1624, 1626 (1976), as quoted by the court in *Westinghouse*, 598 F.2d at 763.

GESMO, the review of recycle-related applications, and the matter of interim licensing." Comments were invited and, on October 4, 1977, a letter submitted on behalf of the President re-emphasized the President's previous comments of April. This letter also suggested accelerated research and development to examine alternative fuel cycles which would not involve direct access to plutonium.

Thereafter, in December 1977, the agency issued an order terminating the GESMO proceedings as well as most proceedings relating to plutonium-recycle license applications. The order also committed the agency to a re-examination of the matter after the completion of the ongoing alternative fuel cycle studies, expected to take about two years. This order was memorialized in a Memorandum of Decision issued on May 8, 1978.

In a series of legal actions, culminating in *Westinghouse*, plaintiff and other interested parties challenged, *inter alia*, the cessation of GESMO and licensing proceedings. At issue was plaintiff's plant, located in Barnwell, South Carolina, for which it had sought an operating license.

In its 1979 decision in *Westinghouse*, 598 F.2d at 770, the Court of Appeals for the Third Circuit described the agency action as follows:

> Essentially, then, the NRC has imposed a moratorium, expected to last about two years, upon its decisionmaking process regarding plutonium recycling, and, as a result, has terminated the pending GESMO and related licensing proceedings.

The court held that the agency did have the authority to impose such a moratorium, stating:

> . . . [A]n agency that is invested with such extensive powers to effectuate its far-reaching mandate may impose a moratorium upon its

> decisionmaking process when sound regulatory reasons exist for doing so. . . .

Id. at 772. Such moratoria may be put in place without a prior finding by the agency that the granting of a license would be inimical to the common defense and security or to the health and safety of the public, particularly where a moratorium is itself designed to enable the agency to make reasoned decisions regarding rules and regulations which should be applied in the context of processing license applications. *Id.* at 772.

The court recognized that the administrative body involved in these deliberations was an independent one, and found that the agency preserved that independence, even while considering comments of many interested parties, including the President. As the court stated:

> . . . the [agency] is directed in many provisions of the AEA to consider "the common defense and security." Any contemplation of these sensitive matters necessarily touches upon areas that are also within the domain of the President and of Congress. [Footnote omitted]. It was therefore appropriate for the [agency] to take note of the relevant developments in the executive and legislative branches and to ascertain, with the help of interested parties, what bearing these developments may have on its own agenda. As we understand the [agency's] actions here, that is all it did, and it maintained its independence from both those branches while making an informed decision to suspend its proceedings. . . . Given this record, we cannot say that the [agency] abused its discretion or acted arbitrarily, capriciously, or not in accordance with the law when it rested its decision in part on a desire not to obstruct the goal of securing international nonproliferation.

Id. at 775-76.

The agency published the substance of this exchange and requested public comment on whether the GESMO proceedings should be reopened. 45 *Fed. Reg.* 53933 (August 13, 1980).

While upholding the agency's moratorium, the court also set forth the following important statement:

> Of course, the [agency] may not completely terminate license applications proceedings without passing on the merits of the applications, simply by declaring an open-ended moratorium. It is required by statute to fix the conditions and regulations pursuant to which licenses will be granted, and to award such licenses if the prerequisites are met, unless it makes a finding of inimicality to the common defense and security or to the public health and safety. [Footnote omitted].

Id. at 774.

The court concluded as follows:

> When and if it ever becomes apparent that the [agency] has *de facto* denied the license applications despite the applicants' compliance with the pertinent regulations and without making a finding of inimicality, or that the moratorium is of unreasonable duration, judicial recourse will be available to the aggrieved parties.

Id. at 774.

The final nine-volume report of the INFCE Hearings was issued in March 1980. *See* International Atomic Energy Agency *INFCE Summary Volume,* 137-56 (1980). At about the same time, a study was issued concerning an interagency Non-proliferation Alternative System Assessment Program (NASAP).

In May 1980, the agency wrote to a representative of the President noting its commitment to re-examine the applications and resume GESMO proceedings. In July 1980, that representative, Mr. Stuart Eizenstat, advised the agency that the views expressed by the Administration in 1977 were still applicable; that the President believed that the GESMO proceedings should remain terminated; and that a reopening of GESMO would be inimical to national security and contrary to the non-proliferation and foreign policy interests of the United States.

Some comments were received, but plaintiff only requested an extension of time. This request was denied but the agency stated that it would consider untimely comments to the extent possible. At the time, plaintiff was engaged in discussions with the government concerning the latter's purchase of the Barnwell plant, as discussed below.

From 1977 to 1983, the government, through the Department of Energy, *inter alia,* undertook significant research and development work at plaintiff's Barnwell facility, expending some $100 million during that six-year period. (Notwithstanding that expenditure, AGNS' Barnwell facility was not operated commercially and earned no profit.)

During this period, consideration was also given to using Barnwell as a storage facility, away from reactors, for utilities' spent fuel. Representatives of AGNS and the government also discussed sale of the facility to the government for this purpose in 1980 and 1981.

In 1981, the new Administration believed it would be inappropriate to purchase the Barnwell facility, and suggested consultation with industry on how to create a more favorable climate for reprocessing by private commercial interests.

In October 1981, President Reagan announced:

> I am lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States. In addition, we will pursue consistent, long-term policies concerning reprocessing of spent fuel from nuclear power reactors and eliminate regulatory impediments to commercial interest in this technology, while ensuring adequate safeguards.

See Statement Announcing a Series of Policy Initiatives on Nuclear Energy, 1981 Pub. Papers 903 (Pltf. App. Vol. 1, Tab 99). Notwithstanding this statement, however, the agency has not reopened GESMO or licensing proceedings.[9]

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that the Federal Government induced plaintiff to incur the expenses of millions of dollars and then, by excess regulation, destroyed any chance of success of the facility.

[9] Moreover, there has, for example, been no administrative implementation of the provisions of the NWPA of 1982, 42 U.S.C. §§ 10101(12) *et seq.*, authorizing the government to accept reprocessed waste in such a way as to encourage reprocessing.

The Department of Energy has declined to establish a system of crediting utilities for reprocessing of their spent fuel. (Pltf. App., Vol. I, Tabs 100, 101.) The Administration has also rejected a 1983 proposal by Bechtel Corporation to utilize the Barnwell facility in a joint venture with the government as a commercial reprocessing demonstration and has agreed to terminate all government research and development projects at that facility. (Pltf. App., Vol. I, tabs 102, 103.)

The government, for the purposes of the instant motions, recognizes the Barnwell facility as capable, on its own, of operating to recycle fuel if granted a license. It points out, however, that in fact, the

A Department of Energy report in March 1983 characterized the Barnwell facility as capable of commercial operation and reprocessing as a proven technology. (Pltf. App., Vol. I, Tab 82, pp. 8, 41, 42.)[10]

Given the agency failure to reopen GESMO and licensing application procedures (although plaintiff has not formally requested such reopening or pursued administrative avenues to challenge any refusal to reopen, by explicit decision or implicitly by delay, and to require such reopening), plaintiff filed suit here in March 1983.

B. Facts about Government Inducement and International "Bargaining Chips"

In particular factual areas, the parties are not in agreement, but have stipulated the facts for the purposes of the pending motions and for such purposes only. These particular areas involve (1) Government Inducement and (2) International "Bargaining Chips".

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plaintiff's plant was just one element of a complete fuel cycle industry, all parts of which would have required further licensing by the agency. Casks for the transportation of spent fuel would need to have been built; plants to fabricate mixed oxide fuel would have to be built and licensed; and operating reactors would have required license amendments to load and use mixed oxide fuel.

The government also notes the regulations of the agency promulgated in 1970 that required that radioactive liquid wastes be solidified within five years of their generation and transferred to a federal waste repository within ten years. This would require plaintiff to complete and secure a license for a waste solidification facility within five years from the time Barnwell began to operate. No federal waste repository for such solid fuel currently exists. However, the NWPA of 1982 establishes a multi-step program for the development of geologic repositories for the disposal of high-level radioactive wastes and spent nuclear fuel, with such facilities probably in operation not before the late 1990's. (*See also* note 5, *supra.*)

[10] Other private associations, such as the International Energy Associates Ltd., also lauded the Barnwell facility as technologically sound. (*See* Pltf. App., Vol. I, tabs 104, 105.)

1. Government Inducement

At the outset of the factual recitation above, it was stated that, beginning with the AFA in 1954, private commercial use of nuclear process was "encouraged". The court in *Westinghouse,* 598 F.2d at 762, n. 4, noted that "the government began encouraging research and development in this field in 1957. . . ."

The plaintiff alleges, and defendant, for the purposes of the pending motions, agrees that the government's encouragement may be characterized as vigorous and, indeed, amounted to "inducement". As stated by plaintiff:

> Without the assurances, land, and technology provided by the Government, AGNS would not have entered the spent fuel reprocessing industry and would not have invested hundreds of millions of dollars to build [its plant]. By 1977, having been coaxed for over twenty years by deliberate and continuing Government inducements and assurances, AGNS had nearly completed the construction of [its plant]. [Plaintiff's brief, at pages 2-3.]

Plaintiff further states, in this connection:

> Beginning with the Atomic Energy Act of 1954 and continuing through 1976, the Government induced private industry to assume an obligation which the Government had guaranteed the electric power utilities it would perform—the maintenance of the back end of the nuclear energy [spent] fuel cycle. [Footnotes omitted]. [Pltf. Br., pp. 6-7.]
>
> The underlying motive for the Government's numerous inducements was the mandate of the [Act of 1954] that private enterprise take the leading role in the nuclear industry. As stated in a Sen-

> ate Report discussing the Act, "[T]he goal of atomic power at competitive prices will be reached more quickly if private enterprise, using private funds, is now encouraged to play a far larger role in the development of atomic power than is permitted under existing legislation". [Footnote omitted]. [Pltf. Br., p. 8.]
>
> In January 1956 the [agency] announced its goal that private industry build plants to reprocess spent nuclear fuel and stated that proposals would be invited for the design, construction and operation of such plants. The [agency] would provide successful applicants access to its laboratories and supply them with initial baseloads of spent fuel. [Footnotes omitted.] [Pltf. Br., p. 9.]
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> * * * * *
>
> To importune public utilities to invest in nuclear power to generate electricity, the [agency] guaranteed the back end of the [spent] fuel cycle. In other words it guaranteed utilities that spent reactor fuel would be the responsibility of the [agency]. . . . To relieve itself of this duty, the [agency] continued its program to induce private industry to invest in reprocessing, hoping to create a private sector to handle the spent fuel. [Footnotes omitted]. [Pltf. Br., pp. 9-10].

As plaintiff notes, the industry remained somewhat hesitant and, in April 1957, the agency, at its own invitation, met with plaintiff and other companies. In October 1957, R.W. Cook, the agency's Acting General Manager stated that the agency still expected private industry to reprocess by June 30, 1967.

In addition to the inducements of providing access to government laboratories and guaranteeing baseload quan-

tities of fuel, as described above, further government inducement and assistance is described by plaintiff as follows:

> Noting that the use of Government plants to perform reprocessing services over the long term would be undesirable, Cook concluded that "[T]he way is open at any time for industry to build and operate a purely commercial reprocessing facility subject only to the [agency's] licensing requirements." [Footnote omitted].
>
> In furtherance of the mandate of [the AEA], the [agency] established its Office of Industrial Participation in May 1961. [Pltf. Br., pp. 10-11.]

Plaintiff also cities many public statements by agency officials and members of congress supporting and encouraging the entry of private enterprise into the reprocessing field.

After noting a number of government requests and contracts with the government in related projects, plaintiff notes that it or, more specifically, one of the members of the joint venture, announced its intention of entering the spent fuel reprocessing industry in 1965, in reasonable reliance upon the government's inducements. The government assisted in the formation of the plaintiff entity by suggesting potential partners.

Morever, plaintiff notes the government's inducements specifically directed to AGNS as follows:

> [A predecessor venture was] awarded a five-year contract to manage the Idaho Nuclear Plant. The contract was intended by the [agency] to give Allied reprocessing experience in return for Allied's assurance that it would proceed with plans to construct its own plant. [Footnotes omitted]. [Pltf. Br., p.16.]
>
> The Government likewise acted to provide land on which [AGNS] could construct a reprocessing

> plant. In March 1967 [agency] Chairman Seaborg wrote to South Carolina Governor McNair, stating that the [agency] could make land available from the Government's Savannah River Plant (SRP) for a proposed privately owned reprocessing plant. [Footnote omitted]. Arrangements were made in March 1968 among the General Services Administration, the State of South Carolina, and the County of Barnwell for the Government to transfer a portion of the SRP property to Barnwell County, which in turn was to convey the site to [AGNS] for the express purpose of constructing [its reprocessing plant] BNFP. [Pltf. Br., pp. 18-19.]

As plaintiff points out, statements of agency officials continued to encourage, and indeed look forward to, entry of private industry into the spent fuel reprocessing field. Officials communicated this desire to AGNS directly, as well. In April 1975, the Energy Research and Development Administration (ERDA) contracted with AGNS to lend AGNS uranium oxide which was to be used in the start-up of plaintiff's plant and then returned to the government (in reprocessed form).

In sum, the government did encourage the entry of private industry, and AGNS in particular, into this field. The degree of encouragement was indeed vigorous and continual.

As defendant notes, however, the industry, and the predecessor companies combining to form the plaintiff AGNS, were highly competent and fully versed, and entered into this endeavor of their own free will as a business venture.

2. International Bargaining Chips[11]

As suggested in the text above, the agency decision to suspend the GESMO hearings was the result of information it had received from the Administration concerning the dangers of international proliferation.[12] Also transpiring were India's atomic test in 1974, using plutonium recovered from an Indian reprocessing plant, and in 1976 and 1977 the French and West German nuclear industries were negotiating to sell reprocessing technology to Brazil and Pakistan.

Concern over proliferation was echoed in an agency announcement in May 1978, as follows:

> . . . [I]f the United States were to deny other nations the right to reprocess while continuing to pursue commercial reprocessing at home, it would undermine the credibility of our concern about the use of plutonium and our international initiatives towards non-proliferation.

43 *Fed. Reg.* 20575, May 1978.

At the time, the private commercial nuclear reprocessing was represented principally by plaintiff's Barnwell plant which was being constructed and was eligible for issuance of an operating permit. However, the government, at that time and to date, has operated a reprocessing plant known as the Savannah River Plant in the same area where plaintiff's Barnwell plant was located.

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[11] In connection with this matter, if the case is not resolved on the dispositive motions, for which purpose defendant has agreed to the facts as alleged by plaintiff, the facts are not only controverted but, for their resolution, extensive discovery has been outlined by plaintiff, much of which is objected to by defendant as involving executive privilege, sensitive foreign policy matters, and on many other grounds.

[12] Such concerns were recognized in the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, as well as the Nuclear Non-Proliferation Act of 1978, Pub. L. 95-242, codified at 22 U.S.C. §§ 3201 *et seq.*

The advice and information furnished by President Carter in 1977 and thereafter, and the agency's response thereto, have been summarized above.

The plaintiff, in its brief at page 34, characterizes these events as follows:

> . . . the Government had sacrificed domestic commercial reprocessing, namely [plaintiff's plant], solely as a bargaining chip for international diplomacy and without any domestic health and safety rationale.

For the purposes of the pending motions, the parties would agree that domestic commercial reprocessing, particularly as it affected operation of plaintiff's plant for which application was pending, was a "bargaining chip" in international negotiations.

Apart from the bargaining chip considerations of nuclear proliferation, no findings have been issued to date, either administratively or in the courts, concerning any ways in which the operation of plaintiff's plant would be inimical to the public health and safety or to the common defense and security.

However, it is also unquestioned that the court in *Westinghouse* found that, as part of the administrative process, it was appropriate, in the interests of common defense and security, for the agency to take note of relevant developments in the executive and legislative branches concerning proliferation and that the agency had not abused its discretion in determining to suspend consideration of plaintiff's application for this purpose.

APPENDIX C

United States Court of Appeals for the Federal Circuit

87-1481

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED CHEMICAL NUCLEAR PRODUCTS, INC. and VALLEY PINES ASSOCIATES,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee,

Judgment

ON APPEAL from the UNITED STATES CLAIMS COURT

in CASE NO(S). 146-83C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

ENTERED BY ORDER OF THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

DATED FEB. 24, 1988

ISSUED AS A MANDATE: March 25, 1988

Costs, Against; Appellant

Printing..... $40.32

Total..... $40.32

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. Section 103 of the Atomic Energy Act of 1954 as amended, 42 U.S.C. §2133, provides in relevant part:

> (a) The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.
>
> . . . . .
>
> (d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common

defense and security or to the health and safety of the public.

2. Section 185 of the Atomic Energy Act of 1954 as amended, 42 U.S.C. §2235, provides:

> All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this chapter, the Commission shall thereupon issue a license to the applicant. For all other purposes of this chapter, a construction permit is deemed to be a "license."